RECORD AND BRIEFS

17-21

No. 17-___

Supreme Ct, U.S.
FILED
JUN 28 2017
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

FANE LOZMAN,

Petitioner,

v.

THE CITY OF RIVIERA BEACH, FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Kerri L. Barsh
GREENBERG TRAURIG
333 S.E. Second Avenue
Miami, FL 33131

Pamela S. Karlan
Counsel of Record
Jeffrey L. Fisher
David T. Goldberg
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

Library of Congress
Law Library

QUESTION PRESENTED

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court held that a plaintiff who claims he was subject to a retaliatory prosecution in violation of the First Amendment must plead and prove the absence of probable cause for the prosecution. The Court subsequently granted certiorari in *Reichle v. Howards*, 566 U.S. 658 (2012), to determine whether that rule should be extended to claims of retaliatory arrest as well. But the Court left that question unanswered, instead resolving the case on grounds of qualified immunity.

This case presents the question *Reichle* reserved:

Does the existence of probable cause defeat a First Amendment retaliatory-arrest claim as a matter of law?

PARTIES TO THE PROCEEDING

Petitioner (plaintiff below) is Fane Lozman. Respondent is the City of Riviera Beach, Florida.

Michael Brown, Gloria Shuttlesworth, Norma Duncombe, Vanessa Lee, Elizabeth Wade, Ann Iles, George Carter, and the City of Riviera Beach Community Redevelopment Agency were also named defendants in the district court. On petitioner's motion, the district court dismissed his claims against these defendants, *see* Pet. App. 23a, who were not parties in the Court of Appeals and therefore are not respondents here.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF AUTHORITIES v
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 1
INTRODUCTION 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 9
I. Courts are intractably divided over the question this Court reserved in *Reichle* 10
II. The question presented is important 16
III. Petitioner's case presents an ideal vehicle for resolving the conflict 18
IV. The existence of probable cause for an arrest should not defeat a First Amendment retaliation claim as a matter of law 21
A. The *Mt. Healthy* burden-shifting framework draws the right distinction between legitimately motivated government government actions and retaliatory ones 22
B. None of the reasons for *Hartman*'s exception to the standard framework applies in the case of retaliatory arrests 25

C. Holding that probable cause defeats a claim of retaliatory arrest undermines First Amendment values 30

D. The rule that probable cause cannot save a racially discriminatory arrest should apply to retaliatory arrests as well 32

CONCLUSION 34

APPENDICES

Appendix A, Opinion of the United States Court of Appeals for the Eleventh Circuit, dated February 28, 2017 ..... 1a

Appendix B, Order of the United States District Court for the Southern District of Florida, dated August 19, 2014 ..... 16a

Appendix C, Jury Instructions (Excerpts) of the United States District Court for the Southern District of Florida, given December 15, 2014 ..... 53a

TABLE OF AUTHORITIES

Page(s)

Cases

Allen v. Cisneros,
815 F.3d 239 (5th Cir. 2016) 13

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 24, 29

Atwater v. City of Lago Vista,
532 U.S. 318 (2001) 30

Barnes v. Edwards,
2016 WL 3457158 (D.N.J. June 24, 2016) 15

Barnes v. Wright,
449 F.3d 709 (6th Cir. 2006) 15

Bennett v. Hendrix,
423 F.3d 1247 (11th Cir. 2005) 6

Bill Johnson's Rests., Inc. v. NLRB,
461 U.S. 731 (1983) 19

Chavez v. Ill. State Police,
251 F.3d 612 (7th Cir. 2001) 33

Connick v. Thompson,
563 U.S. 51 (2011) 27

Corliss v. Lynott,
2016 WL 625071 (M.D. Pa. Jan. 5, 2016), *aff'd*, 2017 WL 57772 (3d Cir. Jan. 5, 2017) 15

County of Riverside v. McLaughlin,
500 U.S. 44 (1991) 30

Crawford-El v. Britton,
523 U.S. 574 (1998) 23, 24, 30

Credico v. West Goshen Police,
574 Fed. Appx. 126 (3d Cir. 2014) 14, 15

Curley v. Village of Suffern,
268 F.3d 65 (2d Cir. 2001) 12

Dahl v. Holley,
312 F.3d 1228 (11th Cir. 2002) 7, 9, 12

DeLoach v. Bevers,
922 F.2d 618 (10th Cir. 1990) 12

Devenpeck v. Alford,
543 U.S. 146 (2004) 28, 29

Dique v. N.J. State Police,
603 F.3d 181 (3d Cir. 2010) 33

Dukore v. District of Columbia,
799 F.3d 1137 (D.C. Cir. 2015) 11, 14, 17

Duran v. City of Douglas,
904 F.2d 1372 (9th Cir. 1990) 11

El v. Crain,
560 F. Supp. 2d 932 (C.D. Cal. 2008) 25

Florence v. Board of Chosen Freeholders,
566 U.S. 318 (2012) 30

Ford v. City of Yakima,
706 F.3d 1188 (9th Cir. 2013) 11

Galarnyk v. Fraser,
687 F.3d 1070 (8th Cir. 2012) 13

Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety,
411 F.3d 427 (3d Cir. 2005) 33

Gullick v. Ott,
517 F. Supp. 2d 1063 (W.D. Wis. 2007) 25

Hartman v. Moore,
132 S. Ct. 2740 (2012) 14

Hartman v. Moore,
547 U.S. 250 (2006) ..... *passim*

Heffernan v. City of Paterson,
136 S. Ct. 1412 (2016) 22

Holland v. City of Portland,
102 F.3d 6 (1st Cir. 1996) 33

Howards v. McLaughlin,
634 F.3d 1131 (10th Cir. 2011) 11, 12

Imbler v. Pachtman,
424 U.S. 409 (1976) 26

James v. City & County of Honolulu,
125 F. Supp. 3d 1080 (D. Haw. 2015) 24

Johnson v. Crooks,
326 F.3d 995 (8th Cir. 2003) 33

Keenan v. Tejeda,
290 F.3d 252 (5th Cir. 2002) 13

Kennedy v. City of Villa Hills,
635 F.3d 210 (6th Cir. 2011) 15, 16

Lebowitz v. City of New York,
606 Fed. Appx. 17 (2d Cir. 2015) 12

Leonard v. Robinson,
477 F.3d 347 (6th Cir. 2007) 20

Lozman v. City of Riviera Beach,
133 S. Ct. 735 (2013) 4, 5

Lozman v. City of Riviera Beach,
713 F.3d 1066 (11th Cir. 2013) 4, 5, 6

Lozman v. City of Riviera Beach,
No. 08-80134-CIV (S.D. Fla. Nov. 4,
2014), ECF 666 7

Marshall v. Columbia Lea Reg'l Hosp.,
345 F.3d 1157 (10th Cir. 2003) 33

Marshall v. City of Farmington Hills,
2017 WL 23806050 (6th Cir. June 1,
2017) 16

Maslenjak v. United States,
2017 WL 2674154 (U.S. June 22,
2017) 32

McCabe v. Parker,
608 F.3d 1068 (8th Cir. 2010) 13, 34

Mesa v. Prejean,
543 F.3d 264 (5th Cir. 2008) 13

Miller v. California,
413 U.S. 15 (1973) 18

Moore v. Hartman,
644 F.3d 415 (D.C. Cir. 2011) 14

Moore v. Hartman,
704 F.3d 1003 (D.C. Cir. 2013) 14

Mozzochi v. Borden,
959 F.2d 1174 (2d Cir. 1992) 12

*Mt. Healthy City Sch. Dist. Bd. of
Educ. v. Doyle*,
429 U.S. 274 (1977) ..... *passim*

NAACP v. Button,
371 U.S. 415 (1963) 19

N.Y. Times Co. v. Sullivan,
376 U.S. 254 (1964) 30

Orgain v. City of Salisbury,
305 Fed. Appx. 90 (4th Cir. 2008) 33

Owen v. City of Independence,
445 U.S. 622 (1980) 18, 19

Pegg v. Herrnberger,
845 F.3d 112 (4th Cir. 2017) 12, 13

Pembauer v. City of Cincinnati,
475 U.S. 469 (1986) 18

Pierson v. Ray,
386 U.S. 547 (1967) 26

Price v. City of Philadelphia,
2017 WL 895586 (E.D. Pa. Mar. 7,
2017) 15

Primrose v. Mellott,
541 Fed. Appx. 177 (3d Cir. 2013) 14

Rankin v. Evans,
133 F.3d 1425 (11th Cir. 1998) 9

Reichle v. Howards,
566 U.S. 658 (2012) ..... *passim*

Safa v. City of Philadelphia,
2015 WL 3444264 (E.D. Pa. May 29,
2015) 15

Scheuer v. Rhodes,
416 U.S. 232 (1974) 26

Skoog v. County of Clackamas,
469 F.3d 1221 (9th Cir. 2006) 7, 11

Smiddy v. Varney,
665 F.2d 261 (9th Cir. 1981) 26

Stone v. Juarez,
2006 WL 1305039 (D.N.M. Apr. 23,
2006) 25

Texas v. Lesage,
528 U.S. 18 (1999) 22, 23

Thayer v. Chiczewski,
705 F.3d 237 (7th Cir. 2012) 11, 16

United States v. Miller,
146 F.3d 274 (5th Cir. 1998) 33

Utah v. Strieff,
136 S. Ct. 2056 (2016) 30, 31

Vakilian v. Shaw,
335 F.3d 509 (6th Cir. 2003) 33

Village of Arlington Heights v. Metro. Hous. Dev. Corp.,
429 U.S. 252 (1977) ..... *passim*

Watson v. Rozum,
834 F.3d 417 (3d Cir. 2016), *cert. denied sub nom. Coutts v. Watson*,
2017 WL 915335 (2017) 15

Wayte v. United States,
470 U.S. 598 (1985) 19, 20, 27

Wesley v. Campbell,
779 F.3d 421 (6th Cir. 2015) 16

White v. City of Laguna Beach,
679 F. Supp. 2d 1143 (C.D. Cal. 2010) 24, 25

Whren v. United States,
517 U.S. 806 (1996) 33

Williams v. City of Carl Junction,
480 F.3d 871 (8th Cir. 2007) 13

Wilson v. Village of Los Lunas,
572 Fed. Appx. 635 (10th Cir. 2014) 11, 12

Constitutional Provisions

U.S. Const., amend. I ..... *passim*

U.S. Const., amend. IV 6, 29, 32

U.S. Const., amend. XIV 6, 10, 22, 32, 33, 34

Statutes

28 U.S.C. § 1254 1
42 U.S.C. § 1983 ..... *passim*
Florida Government in the Sunshine Law 2, 4, 7, 8, 19
Fla. Stat. § 286.011 4
Fla. Stat. § 286.011(8) 4
Fla. Stat. § 286.011(8)(c) 4
Fla. Stat. § 286.011(8)(e) 4
Fla. Stat. § 843.02 6
Fla. Stat. § 871.01(1) 8, 9
Fla. Stat. § 877.03 6

Other Authorities

Activist Arrested at Riviera Beach City Council Meeting, YouTube (Sept. 15, 2009), https://tinyurl.com/lbj5qqj 5
Berman, Mark, *ACLU, Other Groups Sue Baton Rouge Police and Accuse Them of Violating Protesters' Rights*, Wash. Post (July 13, 2016) 17
Blum, Karen, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments*, 29 Touro L. Rev. 633 (2013) 11
Cobert, Beth, "*Banning the Box*" in *Federal Hiring*, U.S. Off. of Personnel Mgmt.: Director's Blog (Apr. 29, 2016) 31

Friedersdorf, Conor, *The Significance of Millions in the Street*, Atlantic (Jan. 23, 2017) 17

Harris, David A., *"Driving While Black" and All Other Traffic Offenses*, 87 J. Crim. L. & Criminology 544 (1997) 28

Kennedy, Randall, *Martin Luther King's Constitution: A Legal History of the Montgomery Bus Boycott*, 98 Yale L.J. 999 (1989) 16, 17

Police Exec. Research Forum, *Police Management of Mass Demonstrations* (2006) 18

Robbins, Liz, *Tax Day Is Met with Tea Parties*, N.Y. Times (Apr. 15, 2009) 17

Silvergate, Harvey A., *Three Felonies a Day* (2009) 28

Sullivan, Bartholomew & Jessica Estepa, *Take a Peek at Protests at Town Halls Around the Country*, USA Today (Feb. 22, 2017) 17

United States, Brief for the United States as Amicus Curiae Supporting Petitioners, *Reichle v. Howards*, 566 U.S. 658 (2012) (No. 11-262) 20

U.S. Dep't of Justice, Civil Rights Div., *Investigation of the Baltimore City Police Department* (Aug. 10, 2016) 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner Fane Lozman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, Pet. App. 1a, is unreported but is available at 2017 WL 765771. The order of the United States District Court for the Southern District of Florida denying respondent's motion for summary judgment, Pet. App. 15a, is reported at 39 F. Supp. 3d 1392 (S.D. Fla. 2014).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 28, 2017. Pet. App. 1a. On May 15, 2017, Justice Thomas extended the time to file this petition for a writ of certiorari to and including June 28, 2017. *See* No. 16A1100. This Court has jurisdiction under 28 U.S.C. § 1254.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,

and to petition the government for a redress of grievances."

42 U.S.C. § 1983 provides in pertinent part:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

INTRODUCTION

Petitioner Fane Lozman is an outspoken critic of certain eminent domain redevelopment efforts proposed by respondent, the City of Riviera Beach, Florida. Among other things, petitioner filed a lawsuit alleging that the City had violated Florida's Government in the Sunshine Act. Shortly thereafter, respondent's City Council, in a closed-door session, reached a "consensus" to send a "message" that would "intimidate" petitioner. Pet. App. 17a-18a. When petitioner began to speak during the public comment period at a subsequent City Council meeting, the presiding councilmember ordered his arrest. After the state's attorney declined to prosecute, petitioner brought suit under 42 U.S.C. § 1983. He sought damages on the ground that the City had violated his First Amendment rights when it retaliated against him for having filed the lawsuit and having publicly criticized the government.

The Eleventh Circuit acknowledged that at trial petitioner had "established a sufficient causal nexus" between his arrest and the retaliatory animus of the City Council. Pet. App. 10a. Nonetheless, it held that petitioner could not recover because the jury's finding that police had probable cause to arrest petitioner for disturbing a lawful assembly—a crime with which he was never charged—defeated his "First Amendment retaliatory arrest claim as a matter of law." *Id.* 11a. This holding further entrenched a longstanding circuit conflict over the legal significance of probable cause in cases alleging retaliatory arrest.

STATEMENT OF THE CASE

1. *Factual background.* This case arises from a dispute over city policy between petitioner and the City of Riviera Beach that resulted in petitioner's arrest in November of 2006. Earlier that year, petitioner, a former United States Marine Corps officer and financial trader, had moved to the City with his floating home and leased a slip in the municipally-owned marina. Pet. App. 16a. Shortly thereafter, petitioner learned that the City planned to redevelop its waterfront area by, among other things, seizing "thousands of homes through the power of eminent domain" and then transferring that property "to a private developer." *Id.* He became an outspoken critic of the plan. *Id.*

Before the City could finalize its agreement with the private developers, the Florida Legislature passed a bill prohibiting the use of eminent domain for private development. Pet. App. 2a. But the day before the Governor was scheduled to sign that bill into law, the City

Council convened an "eleventh-hour" meeting to approve its agreement with the developers. *Id.* 3a.

In response, petitioner filed a lawsuit alleging that the agreement was invalid because the City had violated the Florida Government in the Sunshine Law, Fla. Stat. § 286.011, which requires that the government provide reasonable public notice of a meeting at which official actions will be taken. Pet. App. 2a-3a. After petitioner filed his lawsuit, members of the City Council came under investigation by the Florida Department of Law Enforcement. *Id.* 3a.

Shortly thereafter, the City Council held a closed-door meeting to discuss petitioner's lawsuit. Members expressed their anger at petitioner, and Councilmember Elizabeth Wade proposed that the City "intimidate" him. Pet. App. 3a. The Council Chairperson then asked whether the Council had a "consensus" to send petitioner a "message"; the other councilmembers, along with the City Attorney, agreed. *Id.* 18a.[1]

The City soon undertook a series of actions against petitioner. One example with which this Court is already familiar involved attempting to evict him from the municipal marina. *See Lozman v. City of Riviera Beach*, 133 S. Ct. 735 (2013). The City brought eviction proceedings in state court, but a jury returned a verdict in petitioner's favor, "finding that Lozman's protected speech was a substantial or motivating factor in the City's decision to terminate his lease."

---

[1] Florida's Sunshine Law allows city councils to hold closed-door meetings to discuss pending litigation. Fla. Stat. § 286.011(8). These meetings, however, must be transcribed and the transcripts made public once the litigation concludes. *Id.* § 286.011(8)(c), (e).

Lozman v. City of Riviera Beach, 713 F.3d 1066, 1070 (11th Cir. 2013). Undeterred by these "unsuccessful efforts," *Lozman*, 133 S. Ct. at 739, the City turned to federal admiralty law to seize, and ultimately destroy, petitioner's floating home, *id.* at 740. But this Court held that admiralty law did not allow the seizure because petitioner's floating home was not a "vessel." *Id.*

2. *Petitioner's arrest.* This petition springs from yet another action the City took against petitioner. During a City Council meeting in November 2006, petitioner was given permission to address the Council during the non-agenda public comment period. Pet. App. 3a.[2] The events that followed were, as the court of appeals noted, captured on video. *See id.*; *Activist Arrested at Riviera Beach City Council Meeting*, YouTube (Sept. 15, 2009), https://tinyurl.com/lbj5qqj (at 0:30).

Upon reaching the lectern, petitioner began to speak about local government corruption in Palm Beach County. After a few seconds, Councilmember Wade, who was presiding, attempted to cut him off. Pet. App. 4a. When petitioner continued his remarks, she summoned Riviera Beach Police Officer Francisco Aguirre. Petitioner told Officer Aguirre that he was not finished speaking. Presiding Councilmember Wade then ordered Officer Aguirre to "carry him out." *Id.* Officer Aguirre arrested petitioner, handcuffed him, and removed him from the meeting. *Id.*

Petitioner was taken to the police station and placed in a holding cell. When he was released, he was

---

[2] This is the segment of each Council meeting during which members of the public can speak about matters not on the meeting's agenda. Pet. App. 3a n.2.

given a notice to appear that listed two charges: "disorderly conduct" and "resisting arrest without violence." Pet. App. 4a; *see* Fla. Stat. § 877.03 (disorderly conduct); Fla. Stat. § 843.02 (resisting arrest without violence).

The state's attorney, however, soon dismissed both charges on the basis that there was "no reasonable likelihood of successful prosecution." Pet. App. 4a-5a.

3. *District court proceedings.* Petitioner filed this Section 1983 lawsuit in the United States District Court for the Southern District of Florida. As is relevant here, he alleged that the City directed his arrest in retaliation for his having petitioned the government and having spoken freely on public issues, thereby depriving him of rights secured by the First Amendment. Pet. App. 29a.[3]

To prevail on his First Amendment retaliation claim, petitioner was required to prove three elements. *Bennett v. Hendrix*, 423 F.3d 1247, 1250 (11th Cir. 2005). First, he had to show that he had engaged in protected First Amendment conduct. Second, he had

---

[3] Petitioner brought several other claims under the First, Fourth, and Fourteenth Amendments, as well as under state law. Pet. App. 22a-23a. Those claims, which have been finally resolved, are not at issue in this petition.

Initially, the district court dismissed petitioner's claims on *Rooker–Feldman* grounds in light of the state-court eviction proceeding, at which he had successfully raised a First Amendment retaliation defense. *Lozman*, 713 F.3d at 1071. The Eleventh Circuit reversed and held that petitioner was entitled to proceed in federal court on his claims. *Id.* at 1074.

On remand, petitioner voluntarily dismissed his claims against all defendants other than respondent. Pet. App. 23a.

to show that the City's action would have chilled a person of ordinary firmness. Third, he had to show that his protected First Amendment activity was a motivating factor in the City's action.

But because petitioner was challenging an arrest, Eleventh Circuit precedent required that he prove a fourth factor as well: that there was no probable cause for that arrest. *See Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002). The district court enforced this requirement, though it recognized a "conflict between the circuits" on this point. Order at 2, *Lozman v. City of Riviera Beach*, No. 08-80134-CIV (S.D. Fla. Nov. 4, 2014), ECF 666 (comparing *Dahl* to *Skoog v. County of Clackamas*, 469 F.3d 1221 (9th Cir. 2006)).

The district court denied the City's motion for summary judgment on petitioner's retaliatory-arrest claim. Pet. App. 36a. There was no genuine dispute as to whether petitioner was engaged in protected First Amendment activity: "the record plainly show[ed]" that he "was engaged in expressive political speech, as well as the valid exercise of his right to petition the government," in the months preceding his arrest. *Id.* 32a. Nor was there any dispute that an arrest would chill a person of ordinary firmness.

But the district court determined that there were two disputed issues that required a trial. As to the question of a retaliatory motive, the court pointed to evidence in the record of "a very close temporal connection between the timing of Plaintiff's expressive speech and the filing of the Sunshine Act suit, and the City's exertion of an extended string of legal pressures against Lozman." Pet. App. 30a. This connection was probative of "improper motive behind the City's actions." *Id.* In addition, the court identified "a genuine

issue of material fact on the question of whether City of Riviera Beach police officers had probable cause to arrest Plaintiff for disorderly conduct or resisting arrest without violence." *Id.*

The case proceeded to trial. Midway through that trial, the district court expressed doubt that there had been probable cause to arrest petitioner for either disorderly conduct or resisting arrest. Tr. 81-84, 89-94 (11/26/2014). Referring to the question whether there was *any* justification for petitioner's arrest, the court asked the City, "What else do you have?" *Id.* at 94. The City offered up a different provision, Florida Statute Section 871.01(1), as "perhaps the most on point" statute. Tr. 94 (11/26/2014). That provision makes it a misdemeanor when an individual "willfully interrupts or disturbs any school or any assembly of people met for the worship of God or for any lawful purpose." Fla. Stat. § 871.01(1). Two days later, the district court proposed that it "put this statute in front of the jury" and "eliminate" any reference in the jury instructions to the original charges. Tr. 248 (12/2/2014).[4]

At the close of evidence, the district court instructed the jury that, as a matter of law, petitioner's Sunshine Law suit and his public criticism of the City in the months leading up to his arrest were protected First Amendment activity. Pet. App. 60a. But rather than direct the jury to determine whether members of the City Council had a retaliatory motive, the district court instead instructed the jury to consider whether

---

[4] References to the transcript of the 2014 trial are indicated with "Tr. XX (YY)," where XX provides the page number, and YY refers to the date.

petitioner had proved that *Officer Aguirre* had a culpable state of mind. *Id.* 59a-60a. And finally, in keeping with the Eleventh Circuit's long-established rule for retaliatory-arrest claims, the district court instructed the jury that it should return a verdict for the City unless petitioner had proved that there was no probable cause to arrest him—in particular, for violating Section 871.01(1). *Id.* 60a.

The jury returned a verdict for the City. Pet. App. 2a.

4. *Eleventh Circuit appeal.* The Eleventh Circuit affirmed. It upheld the jury's finding that "Officer Aguirre reasonably believed Lozman was committing, or was about to commit, the offense of Disturbing a Lawful Assembly." Pet. App. 9a. And it reiterated its longstanding rule that probable cause "'constitutes an absolute bar' to a claim for false arrest," even when "the false arrest claim is brought under the First Amendment" as a retaliation claim. *Id.* 7a (quoting *Rankin v. Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998) and citing *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002)). The fact that "the arrest was supported by probable cause defeat[ed] Lozman's First Amendment retaliatory arrest claim as a matter of law." *Id.* 11a. Consequently, although petitioner had made a "compelling" argument that the district court had erred in its jury instructions regarding the City's retaliatory motive, the Eleventh Circuit determined that any error was "harmless." *Id.* 10a-11a.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's decision here implicates a deep and mature circuit split over whether the presence of probable cause categorically defeats a First

Amendment retaliatory-arrest claim. The split intensified following this Court's decisions in *Hartman v. Moore*, 547 U.S. 250 (2006), and *Reichle v. Howards*, 566 U.S. 658 (2012). In *Hartman*, this Court held that a plaintiff alleging retaliatory *prosecution* in violation of the First Amendment must plead and prove that the charges were not supported by probable cause. 547 U.S. at 265-66. The Court subsequently granted certiorari in *Reichle* to decide "whether the reasoning in *Hartman*" should apply to retaliatory *arrests* as well. *See* 566 U.S. at 670. But the Court reserved that question after deciding that the individual defendants in that case were entitled to qualified immunity. *Id.* at 663. Since *Reichle*, the question has evaded uniform resolution. Only this Court can resolve the conflict, and this case presents an ideal opportunity to do so.

This Court should hold that probable cause for an arrest does not defeat a First Amendment retaliatory-arrest claim as a matter of law. Instead, retaliatory arrest cases should follow the standard framework for First Amendment retaliation cases laid out in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). Under that framework, the presence of probable cause for an arrest can be relevant evidence, but it will not categorically foreclose retaliatory-arrest claims. This rule already governs arrests challenged under the Equal Protection Clause, and it should be the rule that governs First Amendment challenges as well.

I. Courts are intractably divided over the question this Court reserved in *Reichle*.

Courts and commentators consistently recognize that the "circuits are split" over whether the presence

of probable cause categorically defeats a civil suit for retaliatory arrest. *Thayer v. Chiczewski*, 705 F.3d 237, 253 (7th Cir. 2012); *see also* Karen Blum, Erwin Chemerinsky & Martin A. Schwartz, *Qualified Immunity Developments*, 29 Touro L. Rev. 633, 647 (2013). That circuit split has only deepened in the five years since *Reichle v. Howards*, 566 U.S. 658 (2012). In addition to the manifest circuit split, there is now in other circuits "widespread instability in the law on the precise question of probable-cause arrests." *Dukore v. District of Columbia*, 799 F.3d 1137, 1145 (D.C. Cir. 2015). While eleven circuits have encountered the question left open by *Reichle*, no consensus has emerged.

1. In two circuits, a plaintiff can prevail in a First Amendment retaliatory-arrest claim even if probable cause existed for the underlying arrest.

In the Ninth Circuit, an arrest "motivated by retaliatory animus" is unlawful, "even if probable cause existed for that action." *Ford v. City of Yakima*, 706 F.3d 1188, 1196 (9th Cir. 2013). Thus, "a plaintiff need not plead the absence of probable cause in order to state a claim for retaliation." *Skoog v. County of Clackamas*, 469 F.3d 1221, 1232 (9th Cir. 2006); *see also Duran v. City of Douglas*, 904 F.2d 1372, 1378 (9th Cir. 1990).

In *Howards v. McLaughlin*, 634 F.3d 1131 (10th Cir. 2011), the Tenth Circuit addressed the "uncertainty" that *Hartman* had injected into claims of retaliatory arrest. *Wilson v. Village of Los Lunas*, 572 Fed. Appx. 635, 643 (10th Cir. 2014). It held that "*Hartman* did not disturb [its] earlier precedent" and thus "an arrest made in retaliation of an individual's First Amendment rights is unlawful, even if the arrest is

supported by probable cause." *Howards*, 634 F.3d at 1148 (citing *DeLoach v. Bevers*, 922 F.2d 618, 620 (10th Cir. 1990)). This Court granted review, but "elect[ed]" not to address the Tenth Circuit's rule regarding probable cause and retaliatory-arrest claims. *Reichle*, 566 U.S. at 663. Instead, it "reverse[d] the judgment of the Court of Appeals denying petitioners qualified immunity." *Id.* Since *Reichle*, the Tenth Circuit has not revisited its holding in *Howards*. *See Wilson*, 572 Fed. Appx. at 643.

2. Conversely, four other circuits are aligned with the Eleventh Circuit in holding that "the existence of probable cause to arrest" bars a First Amendment retaliation claim. *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002).

In the Second Circuit, when "probable cause to arrest exist[s] independent of the defendants' motive," a plaintiff's retaliatory-arrest claim fails as a matter of law. *Mozzochi v. Borden*, 959 F.2d 1174, 1180 (2d Cir. 1992); *see also Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001). Indeed, that court has stated not only that a plaintiff cannot recover for such an arrest, but that the presence of probable cause means that "[n]o First Amendment violation therefore occurred." *Lebowitz v. City of New York*, 606 Fed. Appx. 17, 17-18 (2d Cir. 2015) (summary order).

This year, the Fourth Circuit deepened the circuit split. In *Pegg v. Herrnberger*, 845 F.3d 112 (4th Cir. 2017), it held that because the defendant had probable

cause to arrest the plaintiff, "his arrest was not retaliatory." *Id.* at 119.[5]

The Fifth Circuit also bars retaliatory-arrest suits in cases where there is probable cause to arrest. In *Keenan v. Tejeda*, 290 F.3d 252 (5th Cir. 2002), it declared that the "objectives of law enforcement take primacy over the citizen's right to avoid retaliation" in a situation where "law enforcement officers might have a motive to retaliate," but there is also probable cause. *Id.* at 261-62. In such cases, "any argument that the arrestee's speech" motivated the arrest "must fail, no matter how clearly that speech may be protected by the First Amendment." *Mesa v. Prejean*, 543 F.3d 264, 273 (5th Cir. 2008); *see also Allen v. Cisneros*, 815 F.3d 239, 244-45 (5th Cir. 2016).

Finally, the Eighth Circuit has held that "[l]ack of probable cause is a necessary element" of a First Amendment retaliatory-arrest claim. *McCabe v. Parker*, 608 F.3d 1068, 1075 (8th Cir. 2010); *see Williams v. City of Carl Junction*, 480 F.3d 871, 876 (8th Cir. 2007). The Eighth Circuit reaffirmed this rule after *Reichle*. *Galarnyk v. Fraser*, 687 F.3d 1070, 1076 (8th Cir. 2012).

3. In the years since *Hartman* and *Reichle*, four other circuits have confronted the question whether the presence of probable cause defeats a retaliatory-arrest claim as a matter of law. Each failed to adopt a clear rule.

---

[5] The Fourth Circuit based its holding on the assumption that *Reichle* was "fully controlling" of the question. *Pegg*, 845 F.3d at 119. *But see Reichle*, 566 U.S. at 668 ("To be sure, we do not suggest that *Hartman*'s rule in fact extends to arrests.").

In *Dukore v. District of Columbia*, 799 F.3d 1137 (D.C. Cir. 2015), the D.C. Circuit noted the "widespread instability in the law on the precise question of probable-cause arrests." *Id.* at 1145. It referred to its earlier opinion in *Moore v. Hartman*, 644 F.3d 415 (D.C. Cir. 2011), which had pointed out "that the federal courts of appeals were split" on the question and in which the D.C. Circuit itself had "expressly declined to take sides." *Dukore*, 799 F.3d at 1145. The *Dukore* court then disposed of the case before it on qualified immunity grounds rather than announce a clear, prospective rule. *Id.*[6]

The Third Circuit has been disposing of retaliatory-arrest cases through nonprecedential opinions that have sent contradictory signals to parties and district courts. In *Primrose v. Mellott*, 541 Fed. Appx. 177 (3d Cir. 2013), a panel stated that the Circuit had "not decided whether the logic of *Hartman* applies to retaliatory arrest claims." *Id.* at 180 n.2. But a year later, in *Credico v. West Goshen Police*, 574 Fed. Appx. 126

---

[6] The course of the proceedings in *Moore* illustrates this instability and confusion. After this Court's decision in *Hartman v. Moore*, 547 U.S. 250 (2006), reversed an earlier D.C. Circuit decision, the case was remanded for further proceedings. The D.C. Circuit's ensuing 2011 opinion recognized the circuit split on the question presented by petitioner here, but declared it had "no occasion to address First Amendment retaliatory *arrest* requirements." *Moore v. Hartman*, 644 F.3d 415, 423 n.8 (D.C. Cir. 2011) (emphasis in original). That decision was in turn vacated and remanded by this Court "for further consideration in light of *Reichle*." *Hartman v. Moore*, 132 S. Ct. 2740, 2740 (2012). The D.C. Circuit then decided that "nothing in *Reichle* changes [its] conclusion." *Moore v. Hartman*, 704 F.3d 1003, 1004 (D.C. Cir. 2013) (internal quotation marks omitted).

(3d Cir. 2014), a different panel read *Hartman* to bar retaliatory-arrest claims when "there was probable cause." *Id.* at 128. This has left district courts within the Third Circuit in disarray: some acknowledge the circuit's uncertainty and decide cases on qualified immunity grounds, while others have treated lack of probable cause as an essential element of the plaintiff's claim.[7]

While the Sixth Circuit has read *Hartman* to defeat a First Amendment retaliatory-arrest claim when the arrest is made pursuant to an indictment, *see Barnes v. Wright*, 449 F.3d 709, 720 (6th Cir. 2006), it has "defer[red] resolution" of the question whether *Hartman* extends to a claim alleging a retaliatory arrest "prior to any prosecutorial or grand jury involvement." *Kennedy v. City of Villa Hills*, 635 F.3d 210,

---

[7] For courts that have treated the law as not clearly established, see, e.g., *Corliss v. Lynott*, No. 3:15-CV-01364, 2016 WL 625071, at *10 (M.D. Pa. Jan. 5, 2016), *aff'd*, No. 16-1597, 2017 WL 57772 (3d Cir. Jan. 5, 2017); *Safa v. City of Philadelphia*, No. 2:13-cv-5007-DS, 2015 WL 3444264, at *11 (E.D. Pa. May 29, 2015); and *Price v. City of Philadelphia*, No. 15-1909, 2017 WL 895586, at *7 (E.D. Pa. Mar. 7, 2017), which stated that "*Hartman* does not itself bar Plaintiff's claim" and that it is "unclear whether *Hartman* applies to retaliatory arrests in this Circuit." For an example of a court that has treated lack of probable cause as an "essential element" of a plaintiff's claim, see *Barnes v. Edwards*, No. 13-4239, 2016 WL 3457158, at *6 (D.N.J. June 24, 2016).

In the context of disciplinary proceedings, the Third Circuit has held that "a plaintiff can make out a retaliation claim even though the charge against him may have been factually supported." *Watson v. Rozum*, 834 F.3d 417, 426 (3d Cir. 2016) (prisoners), *cert. denied sub nom. Coutts v. Watson*, 2017 WL 915335 (June 26, 2017); *Hill v. City of Scranton*, 411 F.3d 118, 130-32 (3d Cir. 2005) (municipal employees).

217-18 n.4 (6th Cir. 2011). The Sixth Circuit still has "not resolved whether lack of probable cause is an element" of such retaliatory-arrest claims. *Wesley v. Campbell*, 779 F.3d 421, 435 (6th Cir. 2015) (internal quotation marks omitted); *see also Marshall v. City of Farmington Hills*, 2017 WL 2380650, at *7 (6th Cir. 2017) (resolving claim on qualified-immunity grounds).

Finally, in *Thayer v. Chiczewski*, 705 F.3d 237 (7th Cir. 2012), the Seventh Circuit observed that "circuits are split" on "whether probable cause is a complete bar to First Amendment retaliatory arrest claims." *Id.* at 253 (emphasis omitted). Rather than aligning itself with one side or the other, and even though the "defendants didn't argue qualified immunity on appeal," the court sua sponte resolved the case on the grounds of qualified immunity. *Id.* at 252-53.

II. The question presented is important.

The disarray among the circuits has persisted in significant part because of how those courts have read *Hartman v. Moore*, 547 U.S. 250 (2006), and *Reichle v. Howards*, 566 U.S. 658 (2012). Without this Court's guidance, this important issue will not be resolved.

1. The problem of retaliatory arrests is not new. History is replete with examples of government officials pretextually enforcing minor laws against individuals who have exercised core First Amendment rights. In 1956, for example, police officers in Montgomery, Alabama, arrested and jailed Dr. Martin Luther King, Jr., for driving thirty miles per hour in a twenty-five mile-per-hour zone. *See* Randall Kennedy, *Martin Luther King's Constitution: A Legal History of*

the Montgomery Bus Boycott, 98 Yale L.J. 999, 1028 (1989).

Recent years have seen a fresh surge of civic engagement, much of it involving criticism of the government. *See, e.g.*, Bartholomew Sullivan & Jessica Estepa, *Take a Peek at Protests at Town Halls Around the Country*, USA Today (Feb. 22, 2017), https://tinyurl.com/m9k67uy; Conor Friedersdorf, *The Significance of Millions in the Street*, Atlantic (Jan. 23, 2017), https://tinyurl.com/l5m38zz; Liz Robbins, *Tax Day Is Met with Tea Parties*, N.Y. Times (Apr. 15, 2009), https://tinyurl.com/coh9tq.

Thus, the risk of retaliatory arrests remains a pressing concern, as a recent report by the U.S. Department of Justice shows. *See* U.S. Dep't of Justice, Civil Rights Div., *Investigation of the Baltimore City Police Department* 116-21 (Aug. 10, 2016), https://tinyurl.com/kzm8las ("In sum, BPD takes law enforcement action in retaliation for individuals' engaging in protected speech or activity in violation of the First Amendment."); Mark Berman, *ACLU, Other Groups Sue Baton Rouge Police and Accuse Them of Violating Protesters' Rights*, Wash. Post (July 13, 2016), https://tinyurl.com/kcdbvfp.

2. The "widespread instability in the law on the precise question of probable-cause arrests," *Dukore v. District of Columbia*, 799 F.3d 1137, 1145 (D.C. Cir. 2015), leaves municipalities in an untenable position. Current law is unclear as to whether and when an officer can consider a target's speech or conduct in deciding whether to make an arrest. But jurisdictions need guidance as to how to train police officers on the proper relationship between probable cause and respect for

individuals' First Amendment rights. Police Exec. Research Forum, *Police Management of Mass Demonstrations* 73 (2006) (describing the need to "balance a number of conflicting demands," including respect for First Amendment rights). The availability of qualified immunity for individual defendants is no answer to this uncertainty since jurisdictions may still face liability for arrests directed by policymakers. *See Pembauer* v. *City of Cincinnati*, 475 U.S. 469, 484 (1986) (county prosecutor directing sheriffs to "go in and get [them]"); Pet. App. 4a (presiding councilmember directing officer to "carry him out").

3. This Court has long emphasized that, "[u]nder a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community." *Miller* v. *California*, 413 U.S. 15, 30 (1973). Not so under existing circuit precedent. An individual arrested in Selma, Alabama, because he exercised his First Amendment rights cannot prevail on a Section 1983 claim if there was probable cause to arrest him for a minor infraction. *See supra* at 12 (law in the Eleventh Circuit). But an individual arrested for the same reasons in Selma, California, can. *See supra* at 11 (law in the Ninth Circuit). An individual's ability to vindicate his rights should not be left to geographic accident.

III. Petitioner's case presents an ideal vehicle for resolving this conflict.

1. This case presents an especially clean opportunity for the Court to answer this long-simmering and important question.

First, the defendant in this case is a municipality. In *Owen* v. *City of Independence*, 445 U.S. 622 (1980),

this Court held that municipalities cannot assert qualified immunity. *Id.* at 657. Thus, there is no possibility that if this Court grants certiorari it will end up resolving the case on qualified immunity grounds. By contrast, many retaliatory-arrest cases are brought against individual government officials, often line-level police officers. Because defendants in those cases will usually seek, and frequently be entitled to, qualified immunity, many courts decline to resolve the question whether probable cause defeats a damages claim arising from a retaliatory arrest. That in fact is what happened before this Court in *Reichle v. Howards*, 566 U.S. 658, 663 (2012).[8]

Second, in this case, petitioner's Sunshine Law suit and his criticism of the City's policies in the months leading up to his arrest were entirely protected by the First Amendment. Pet. App. 60a. Litigation and criticism of the government are core First Amendment activities. *See Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983); *see also NAACP v. Button*, 371 U.S. 415, 439-41 (1963).

By contrast, in other retaliatory-arrest cases, there is sometimes disagreement over whether the plaintiff's conduct is protected activity or an element of the crime for which he was arrested. For example, in *Reichle*, this Court cited *Wayte v. United States*, 470 U.S. 598 (1985), as a case where the petitioner claimed that his speech—letters he sent to the Selective Service expressing disagreement with the draft—

---

[8] Moreover, because this case arises under Section 1983, the Court need not decide the logically antecedent question presented in *Reichle*: whether *Bivens* "extends to violations of the First Amendment." 566 U.S. at 663 n.4.

was protected by the First Amendment, but the Court determined that it constituted evidence of "one of the elements of the offense" with which he had been charged. *Id.* at 612-13; *see Reichle*, 566 U.S. at 668. In those sorts of cases, this Court may be unable to resolve the question presented without first deciding whether the plaintiff engaged in protected First Amendment activity at all. In *Reichle*, the Government made an argument along these lines. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 25-27, *Reichle*, 566 U.S. 658 (No. 11-262).

Third, as it comes to this Court, the existence of probable cause is settled. A jury found that petitioner's arrest was supported by probable cause; the Eleventh Circuit affirmed that finding, Pet. App. 8a-9a; and petitioner does not challenge that determination here. Thus, the only remaining issue is whether the presence of probable cause defeats petitioner's First Amendment retaliatory-arrest claim as a matter of law. By contrast, in cases that come to this Court on motions to dismiss or for summary judgment, the existence of probable cause is often still contested. In such cases, this Court's ability to answer the question presented could be derailed by a conclusion that probable cause did not in fact exist. That was what prevented the Sixth Circuit from answering the same question presented in *Leonard v. Robinson*, 477 F.3d 347, 356 (6th Cir. 2007).

2. This Court's decision on the question presented will be outcome determinative here.

The Eleventh Circuit recognized that petitioner had made a "compelling" argument that the jury was not properly instructed on his "theory of animus and causation," and that the district court thereby "erred

by instructing the jury" to focus on Officer Aguirre rather than the City's policymakers. Pet. App. 10a. Nonetheless, the court of appeals affirmed the judgment on the basis of its rule that "probable cause defeat[ed] Lozman's First Amendment retaliatory-arrest claim as a matter of law." *Id.* 11a. That rule rendered any error "harmless." *Id.* 10a-11a.

Because this harmless-error determination turns entirely on the Eleventh Circuit's probable-cause rule, it cannot survive a decision by this Court rejecting that rule. Therefore, if this Court holds that probable cause does not bar a First Amendment retaliatory-arrest claim as a matter of law, petitioner will be entitled to a new trial.

IV. The existence of probable cause for an arrest should not defeat a First Amendment retaliation claim as a matter of law.

A plaintiff claiming retaliation for protected First Amendment activities ordinarily must plead and prove three elements: first, that he was engaged in constitutionally protected activity; second, that he was subjected to a meaningfully adverse official action; and third, that his protected activity was a "motivating factor" behind that action, *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270-71 & n.21 (1977)).

In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court added an additional element to that framework in cases alleging retaliatory prosecution. It held that, in such cases, the absence of probable cause "must be pleaded and proven" as "an element of a plaintiff's case." *Id.* at 266.

But none of the justifications underlying this Court's decision in *Hartman* warrant extending its rule to retaliatory-arrest claims. To the contrary, the standard framework is both workable and more consistent with the First Amendment values at stake. And since probable cause has never barred challenges to racially discriminatory arrests, it should not bar First Amendment retaliatory-arrest claims either.

A. The *Mt. Healthy* burden-shifting framework draws the right distinction between legitimately motivated government actions and retaliatory ones.

1. "[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for engaging in constitutionally protected activity. *Hartman*, 547 U.S. at 256. Thus, when a plaintiff shows that the government acted against him "out of a desire to prevent" him from engaging in protected First Amendment activity, he "is entitled to challenge that unlawful action under the First Amendment." *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016).

But this Court has also recognized that government conduct is not always "motivated solely by a single concern." *Arlington Heights*, 429 U.S. at 265. Accordingly, the Court has held that "even if the government has considered an impermissible criterion in making a decision adverse to the plaintiff, it can nonetheless defeat liability by demonstrating that it would have made the same decision absent the forbidden consideration." *Texas v. Lesage*, 528 U.S. 18, 20-21 (1999).

The standard framework for implementing this principle was enunciated in *Mt. Healthy* and *Arlington Heights*.[9] Once a plaintiff has made out a case of unconstitutional retaliation, the burden of proof shifts to the defendant to rebut causation. The defendant must show that it would have taken the same action "even in the absence of the protected conduct." *Mt. Healthy*, 429 U.S. at 287. In other words, the fact that the defendant articulates a legitimate basis that *could* have motivated its action is not enough; rather, it must show that that legitimate basis actually *did* motivate its action.

The virtue of this burden-shifting framework has long been recognized. *See Mt. Healthy*, 429 U.S. at 287. It holds public officials and municipalities liable unless they rebut the plaintiff's showing of a causal connection between his injury and their impermissible motive, thereby recognizing that "[o]fficial reprisal for protected speech 'offends the Constitution.'" *Hartman*, 547 U.S. at 256 (quoting *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998)). But it also recognizes that "there is no cognizable injury warranting relief under § 1983" when "the government would have made the same decision" in any event. *Lesage*, 528 U.S. at 21.

2. The *Mt. Healthy* framework is well-suited to retaliatory-arrest claims. Courts that treat retaliation claims involving arrests the same as other retaliation claims have tools for resolving cases accurately and efficiently.

---

[9] Although *Mt. Healthy* involved a First Amendment claim, and *Arlington Heights* involved an Equal Protection claim, this Court has treated that distinction as "immaterial." *Lesage*, 528 U.S. at 21.

As an initial matter, pleading rules enable district courts to weed out meritless claims quickly at minimal cost. The *Mt. Healthy* framework requires that the plaintiff show that an impermissible purpose was "a motivating factor" in the challenged government decision. *Arlington Heights*, 429 U.S. at 266. As this Court made clear in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), plaintiffs who allege that a government action is unconstitutional because of the motive behind it must do more to meet their burden at the pleading stage than advance "naked assertion[s] devoid of further factual enhancement." *Id.* at 678 (internal quotation marks omitted). Thus, only plaintiffs whose complaints "contain sufficient factual matter" to show a "plausible" entitlement to relief can survive a motion to dismiss. *Id.*

Moreover, even past the pleading stage, "the existing procedures available to federal trial judges in handling claims that involve examination of an official's state of mind" offer "many options for the district judge." *Crawford-El*, 523 U.S. at 597, 599. These options enable them to limit or otherwise "manage the discovery process to facilitate prompt and efficient resolution of the lawsuit." *Id.* at 599. And summary judgment enables them to "weed out truly insubstantial lawsuits prior to trial." *Id.* at 600.

The experience in the lower courts shows that district courts can use these techniques to handle retaliatory-arrest suits without imposing a rule that probable cause categorically defeats these claims. For example, district courts within the Ninth Circuit have adjudicated these claims for over a decade without resorting to such a rule. *See, e.g.*, *James v. City & County of Honolulu*, 125 F. Supp. 3d 1080, 1097-98 (D. Haw. 2015); *White v. City of Laguna Beach*, 679 F.

Supp. 2d 1143, 1149-50 (C.D. Cal. 2010); *El v. Crain*, 560 F. Supp. 2d 932, 949-50 (C.D. Cal. 2008); *see also Gullick v. Ott*, 517 F. Supp. 2d 1063, 1072-73 (W.D. Wis. 2007); *Stone v. Juarez*, No. CIV 05-508, 2006 WL 1305039, at *8, *13-14 (D.N.M. Apr. 23, 2006).

Thus, the standard framework is entirely capable of handling retaliatory-arrest claims.

B. None of the reasons for *Hartman*'s exception to the standard framework applies in the case of retaliatory arrests.

Under *Mt. Healthy*'s rule, the responsibility for showing probable cause in retaliatory-arrest cases will lie with the defendant, who can use the presence of probable cause either to argue that he had no retaliatory motive or to show that, though he had such a motive, he would have arrested the plaintiff in any event. Thus, the mere existence of probable cause, though potentially probative, is not dispositive.

For reasons "specific to retaliatory-prosecution cases," this Court in *Hartman* carved out an exception to the rule governing "ordinary retaliation claims." 547 U.S. at 259. Under *Hartman*'s rule, a plaintiff who brings a First Amendment claim of retaliatory prosecution must not only plead and prove that an impermissible retaliatory purpose was a motivating factor in his prosecution, but must also affirmatively plead and prove the absence of probable cause. *Id.* at 265-66.

None of the reasons this Court gave in *Hartman* for departing from the *Mt. Healthy* burden-shifting framework in retaliatory-prosecution cases applies to claims of retaliatory arrest.

1. In *Hartman*, this Court said the "strongest justification for the no-probable-cause requirement" was

the complex causal connection inherent in retaliatory-prosecution claims. *Hartman*, 547 U.S. at 259. A prosecutor generally makes the decision about whether to prosecute after exercising "independent judgment." *Id.* at 263 (quoting *Smiddy v. Varney*, 665 F.2d 261, 267 (9th Cir. 1981)). And a prosecutor is absolutely immune from liability for making that decision. *See Imbler v. Pachtman*, 424 U.S. 409, 431 (1976). Thus, the defendant in a retaliatory-prosecution case will never be the prosecutor who directly inflicted the plaintiff's injury. Instead, the defendant will be some person further back in the causal chain who, at most, influenced the prosecutor's decision to file charges. Proof of the absence of probable cause, the Court suggested, can help to "bridge the gap between the nonprosecuting government agent's motive and the prosecutor's action." *Hartman*, 547 U.S. at 251.

By contrast, "there is no gap to bridge" in retaliatory-arrest cases. *Reichle v. Howards*, 566 U.S. 658, 671 (2012) (Ginsburg, J., concurring). Indeed, the causal chain in a retaliatory-arrest case is no more complex than it is in other retaliation cases—the kinds of cases that are indisputably governed by the *Mt. Healthy* framework. Neither a line-level officer who makes an arrest, nor an official who orders one, is entitled to absolute immunity. *See Pierson v. Ray*, 386 U.S. 547, 555 (1967) (police officers); *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974) (high-level officials). So the defendant in a retaliatory-arrest case is the actor who inflicted the injury. And of course, in a case where a plaintiff alleges that his retaliatory arrest was the product of a municipal policy—as petitioner did here, *see* Pet. App. 10a—there is no question

of immunity at all. Because the plaintiff in a retaliatory-arrest claim can directly sue the actor who caused his injury, there is no "problem of causation," *Hartman*, 547 U.S. at 263.[10]

2. In *Hartman*, this Court also cited the "presumption of regularity accorded to prosecutorial decisionmaking" as a reason for imposing an additional burden on plaintiffs claiming retaliatory prosecution. *Hartman*, 547 U.S. at 263.

This Court has already declared that this presumption "does not apply" in the context of retaliatory arrests. *Reichle*, 566 U.S. at 669. The presumption therefore provides no basis for extending the *Hartman* rule to retaliatory-arrest cases.

3. In *Hartman*, this Court stated that requiring a plaintiff to plead and prove a lack of probable cause in a retaliatory-prosecution case would impose "little or no added cost" on the plaintiff. *Hartman*, 547 U.S. at 265-66. It offered two bases for that conclusion. The first is that the existence of probable cause is likely to be at issue in every retaliatory-prosecution case. The second is that putting the burden on the plaintiff to

---

[10] Moreover, when it comes to checking prosecutorial retaliation, there are mechanisms other than Section 1983 damages lawsuits. First, criminal defendants can raise a defense of selective prosecution, even if there is probable cause to charge the underlying crime. *See Wayte v. United States*, 470 U.S. 598, 607-08 (1985). Second, prosecutors who are found to have acted with impermissible motives face both judicial reprimand and bar discipline. *See, e.g., Connick v. Thompson*, 563 U.S. 51, 65-66 (2011). Neither of these avenues is available with respect to retaliatory arrests.

plead and prove its absence is not unduly onerous. Neither of those bases justifies extending that requirement to retaliatory-arrest cases.

It is true enough that probable cause can be an issue in retaliatory-arrest cases, as petitioner has already explained. *See supra* at 25. But that should not, standing alone, determine who should bear the responsibility for pleading the issue of probable cause, proving its existence, or persuading the factfinder as to whether the arrest would have occurred in the absence of a retaliatory motive. Differences between arrests and prosecutions cut strongly against placing any of these burdens on the plaintiff.

In a retaliatory-prosecution case, the plaintiff will by definition have a charging instrument that cabins the scope of the probable-cause inquiry, and thus any burdens of pleading or proof, by identifying a specific crime. That will not be the case in lawsuits claiming retaliatory arrest. An arresting officer is not required to state the crime for which he made the arrest. *See Devenpeck v. Alford*, 543 U.S. 146, 155 (2004). Thus, when, as often happens, a plaintiff was arrested but was never formally charged, it may be unclear for which crimes he should be expected to plead, and later prove, the absence of probable cause.

This problem is particularly acute because contemporary federal, state, and municipal codes criminalize a wide range of behavior that Americans regularly engage in. *See* David A. Harris, *"Driving While Black" and All Other Traffic Offenses*, 87 J. Crim. L. & Criminology 544, 557-58 (1997); *see also* Harvey A. Silvergate, *Three Felonies a Day* (2009). If this Court were to extend *Hartman* to arrests, a plaintiff would

have to plead sufficient facts to show that no reasonable officer could have had probable cause to believe the plaintiff violated any one of these statutes. *See Ashcroft v. Iqbal*, 556 U.S. at 680-81. This burden is unwarranted.

Even if a plaintiff were to have an arrest report or some other document alleging specific crimes, that document still would not cabin the probable-cause inquiry in a retaliatory-arrest case. So long as the facts known to the officer at the time of the arrest supply sufficient basis for a reviewing authority to find probable cause with respect to *some* crime, the Fourth Amendment's probable-cause requirement is satisfied. *See Devenpeck*, 543 U.S. at 155-56. By contrast, in a retaliatory-prosecution case, a plaintiff need address only the charges in the actual indictment or information on which his prosecution was based. If the plaintiff shows a retaliatory motive and a lack of probable cause as to those charges, he can prevail regardless of whether he could have been (but never was) charged with some other crime.

Petitioner's case illustrates the problem. The notice to appear he was given after his arrest alleged two crimes: "disorderly conduct" and "resisting arrest without violence." Pet. App. 4a. Those were the crimes for which, at the time he filed suit, he could fairly be said to have had notice of any need to address the question of probable cause. But eight years later, weeks into trial on petitioner's civil rights claim, the district court permitted the defendant to inject into the case an entirely different charge—disturbing a lawful assembly—that petitioner was required to rebut instead. Tr. 94 (11/26/2014); *see also* Pet. App. 61a-62a.

Allowing defendants to conjure a new basis for probable cause at any point in the litigation means plaintiffs can never be sure as to which charges they will have to respond.

C. Holding that probable cause defeats a claim of retaliatory arrest undermines First Amendment values.

1. The First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). When government officials inflict harm on an individual because that individual has engaged in activity protected by the First Amendment, this retaliation "offends the Constitution" and "threatens to inhibit exercise of the protected right." *Crawford-El v. Britton*, 523 U.S. 574, 588 & n.10 (1998).

The consequences of an arrest, even if no charges are ultimately filed and no prosecution is ultimately pursued, are daunting. Individuals can be handcuffed and taken to jail for infractions as minor as failing to wear a seatbelt or failing to provide proof of insurance. *See Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). They can be held in jail for two days before a probable-cause determination. *County of Riverside v. McLaughlin*, 500 U.S. 44, 57-58 (1991). And "once they are taken to jail," even "offenders suspected of committing minor offenses" can be repeatedly strip searched. *Florence v. Board of Chosen Freeholders*, 566 U.S. 318, 330 (2012).

Nor do the harms from an arrest end after charges are dropped. Individuals who have been arrested are vulnerable to "discrimination by employers, landlords,

and whoever else conducts a background check," because an arrest record is often used to deny an applicant housing or employment. *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting); *see also* Beth Cobert, *"Banning the Box" in Federal Hiring*, U.S. Off. of Personnel Mgmt.: Director's Blog (Apr. 29, 2016), https://tinyurl.com/mebcoko.

And *retaliatory* arrests harm individuals beyond those who are actually taken into custody. The prospect of being arrested will deter many individuals from exercising their First Amendment rights at all, particularly when it comes to criticizing the government. A Riviera Beach resident "of ordinary firmness" who attended the Council meeting or saw the video of petitioner being arrested, handcuffed, and manhandled out of the City Council chambers would surely think twice before speaking his or her mind about the City's policies.

2. Barring retaliatory-arrest suits in any case where there is probable cause effectively authorizes pretextual arrests that target people engaged in protected First Amendment activity. As petitioner has already explained, there are almost limitless opportunities to establish probable cause. *See supra* at 28. Because such a rule immunizes retaliatory arrests whenever a defendant can point, even long after the fact, to some offense for which there was probable cause, it therefore blunts the deterrence and compensation functions served by Section 1983 lawsuits.

Even worse, this rule creates an incentive for government officials to channel whatever retaliatory impulses they may have into arresting their targets. A police officer who hassles or uses excessive force against individuals on account of their protected First

Amendment activities will face liability under the *Mt. Healthy* framework unless he can prove he would have engaged in the same behavior absent his retaliatory motive. But if that officer arrests an individual, the near-universal presence of probable cause for *some* crime will effectively insulate him from liability.

So too with a municipality, like the City of Riviera Beach here. Municipalities encounter their residents on a daily basis through a wide variety of interactions. If they retaliate against a resident for his exercise of protected First Amendment activity by, for example, excluding him from the public library or turning off his utilities or firing him from his government job, they will face liability under the *Mt. Healthy* framework unless they can show they would in fact have taken the same action for legitimate reasons. But if instead they order his arrest when he stands at the lectern during a public comment period—or drives "60 miles an hour in a 55-mile-an-hour zone," Tr. of Oral Arg. at 27, *Maslenjak v. United States*, 2017 WL 2674154 (U.S. June 22, 2017)—under the Eleventh Circuit's rule, they are nearly certain to escape liability.

D. The rule that probable cause cannot save a racially discriminatory arrest should apply to retaliatory arrests as well.

Probable cause does not defeat a Fourteenth Amendment challenge to an arrest. Nor should it defeat a First Amendment challenge.

This Court long ago established that the standard for assessing mixed motives in cases alleging that the government acted for an impermissible purpose is the same whether the claim arises under the First or Fourteenth Amendment. *See Arlington Heights*, 429 U.S.

at 270-71 n.21; *Mt. Healthy*, 429 U.S. at 287 & n.2. And in *Whren v. United States*, 517 U.S. 806 (1996), this Court explained that even if pretextual arrests do not violate the Fourth Amendment, "the Constitution prohibits selective enforcement of the law based on considerations such as race." *Id.* at 813. Thus, the Equal Protection Clause provides a "constitutional basis for objecting to intentionally discriminatory application of laws" governing arrests. *Id.*

The courts of appeals have uniformly read *Whren* to permit equal protection challenges to police seizures, even when those seizures are supported by probable cause, if the plaintiff can show that his race was a factor in the officer's decision to detain him. *See Holland v. City of Portland*, 102 F.3d 6, 11 (1st Cir. 1996); *Gibson v. Superintendent of N.J. Dep't of Law & Pub. Safety*, 411 F.3d 427, 440-41 (3d Cir. 2005) *overruled on other grounds by Dique v. N.J. State Police*, 603 F.3d 181 (3d Cir. 2010); *United States v. Miller*, 146 F.3d 274, 279 n.3 (5th Cir. 1998); *Vakilian v. Shaw*, 335 F.3d 509, 521 (6th Cir. 2003); *Chavez v. Ill. State Police*, 251 F.3d 612, 635 (7th Cir. 2001); *Johnson v. Crooks*, 326 F.3d 995, 999-1000 (8th Cir. 2003); *Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1166 (10th Cir. 2003); *see also Orgain v. City of Salisbury*, 305 Fed. Appx. 90, 99 (4th Cir. 2008).

The Eighth Circuit illustrates lower courts' inconsistent treatment of probable cause despite this Court's uniform treatment of impermissible motives in *Arlington Heights* and *Mt. Healthy*. On the one hand, the Eighth Circuit has aligned itself with every other circuit to hold that an Equal Protection claim "does not require proof" that the plaintiff "was stopped without probable cause or reasonable suspicion." *Johnson*, 326

F.3d at 999. On the other hand, without any recognition of the inconsistency, it has imposed exactly such a requirement for retaliatory-arrest claims. *McCabe v. Parker*, 608 F.3d 1068, 1075 (8th Cir. 2010).

If the existence of probable cause does not defeat Fourteenth Amendment-based challenges to arrests as a matter of law, there is no reason that it should defeat First Amendment-based challenges. No court has ever explained why a protestor pretextually arrested for jaywalking should be able to challenge his arrest if he was targeted as an African American, but not if he was targeted as a Republican. Nor could one.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Kerri L. Barsh
GREENBERG TRAURIG
333 S.E. Second Avenue
Miami, FL 33131

Pamela S. Karlan
Counsel of Record
Jeffrey L. Fisher
David T. Goldberg
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
karlan@stanford.edu

June 28, 2017

APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 15-10550

Non-Argument Calendar

D.C. Docket No. 9:08-cv-80134-DTKH

FANE LOZMAN,

Plaintiff-Appellant,

versus

CITY OF RIVIERA BEACH,
a Florida municipal corporation,

Defendant-Appellee,

MICHAEL BROWN,
an individual, et al.,

Defendants.

Appeal from the United States District Court
for the Southern District of Florida

(February 28, 2017)

Before HULL, MARCUS, and MARTIN, Circuit Judges.

PER CURIAM:

Plaintiff Fane Lozman brought suit pursuant to 42 U.S.C. § 1983 against the City of Riviera Beach, Flor-

ida ("the City") after he was arrested at a Riviera Beach City Council meeting on November 15, 2006. Lozman claimed his arrest violated the First and Fourth Amendments, and constituted a false arrest under Florida state law. The case was tried before a jury and the jury returned a verdict in favor of the City on all claims. Lozman appeals (1) the district court's denial of his motion for new trial, and (2) various instructions the district court gave the jury. After careful review, we affirm.

I.

A.

Lozman moved to the City in March 2006 and lived in a floating home in the Riviera Beach Marina. After moving there, Lozman learned that the City had proposed a redevelopment plan for the Marina, which sought to revitalize the City's waterfront through the use of eminent domain. While many residents opposed the plan, especially the proposed use of eminent domain, Lozman became "an outspoken critic." He attended City Council meetings in May and June 2006 at which he sharply criticized the Mayor and the Council.

While the City was finalizing its redevelopment plan, the Florida legislature passed a bill prohibiting the use of eminent domain for private development. In an effort to pass the redevelopment plan before the law went into effect, the City Council held a special emergency meeting the day before the Governor was scheduled to sign the bill into law. That evening, the City approved the redevelopment plan. On June 8, 2006, Lozman filed a lawsuit against the City under the Florida Sunshine Law, seeking to invalidate the City's ap-

proval of the redevelopment plan on the ground that the eleventh-hour meeting was convened without sufficient public notice. On June 28, 2006, the Council held a closed executive session to discuss Lozman's suit.[1] During this meeting, Councilperson Elizabeth Wade said:

> I think it would help to intimidate the same way as [the Florida Department of Law Enforcement] is coming to my house. I am wondering if my lines are tapped or whatever. I think they should be questioned by some of our people . . . so that they can feel the same kind of unwarranted heat that we are feeling . . . .

In response, another councilperson said: "I think what Ms. Wade says is right. We do have to beat this thing, and whatever it takes, I think we should do it."

On November 15, 2006, the City Council held a regular public session. Lozman was granted permission to speak during the "non-agenda" public comments portion of the meeting.[2] The events surrounding Lozman's comments at the meeting, and his subsequent arrest, were captured on video. Upon reaching

---

[1] Florida law permits city councils to hold closed executive sessions for the purpose of discussing pending litigation with counsel. *See* Fla. Stat. § 286.011(8). Although the sessions are closed to the public, the entire session must be transcribed by a court reporter, and the transcript must be made available to the public upon conclusion of the litigation. *Id.* § 286.011(8)(c) & (e)

[2] At each public meeting of the City Council, once the City Council has completed discussion of the agenda items, there is a non-agenda public comment period during which members of the public can address the Council on matters that were not on the agenda.

the podium, Lozman said, "As is typical, the Mayor and [another Councilperson] aren't here during my comments." The Council remained silent. Lozman proceeded: "The U.S. Attorney's Office has arrested the second corrupt local politician . . . former Palm Beach County Commissioner Tony Masilotti." At that point, Councilperson Wade interjected, "You will not stand up and go through that kind of . . . ." Lozman interrupted Councilperson Wade and said "Yes, I will." Councilperson Wade responded, "No, you won't." Lozman continued with his allegations despite Councilperson Wade's instructions. Wade then called out "Officer," summoning City Police Officer Francisco Aguirre who was providing security for the meeting. As Officer Aguirre approached Lozman at the podium, Lozman, speaking louder, said, "I am informing the citizens that two County Commissioners . . . ." After walking up to Lozman, Officer Aguirre gestured to him and said "Will you walk outside with me[?] I need to talk to you." In response, Lozman said, "I'm not finished," and continued speaking. Officer Aguirre then told Lozman, "You're going to be arrested if you don't walk outside." Lozman responded, "Excuse me? I'm not walking outside, I haven't finished my comments." Councilperson Wade then said, "Well, carry him out." Officer Aguirre handcuffed Lozman. Lozman yelled, "Why am I being arrested! I have a First Amendment right!" Councilperson Wade responded, "If you go out, you won't be arrested." After Lozman was removed from the meeting, the next person to speak was called to the podium. Lozman was charged with disorderly conduct and resisting arrest without violence. The state's attorney determined there was probable cause for the arrest but

dismissed the charges because there was "no reasonable likelihood of successful prosecution."

B.

In February 2008, Lozman filed a § 1983 action against the City. Lozman claimed the City retaliated against him for opposing the City's redevelopment plan by having him arrested at the City Council meeting. Lozman brought claims for: (1) retaliation by false arrest, in violation of the First Amendment; (2) unreasonable seizure, in violation of the Fourth Amendment; and (3) common-law false arrest.

In November 2014 the case went to trial, with Lozman proceeding *pro se*. Among the many instructions the district court gave the jury, Lozman challenges two on appeal. The first is the district court's instruction on retaliatory animus. The court instructed the jury that, in order to find the City liable for the First Amendment retaliatory arrest claim, the jury had to find that "a [City] police officer arrested [Lozman] and *the officer* was motivated to take this action because he had an impermissible animus to retaliate against Mr. Lozman for engaging in constitutionally protected speech or conduct." (Emphasis added.)

The second instruction relevant to Lozman's appeal consists of two comments the district court made when instructing the jury on the City's authority to limit the subject matter of public comment during City Council meetings. First, during Lozman's testimony, the court said:

> Clearly, it would not be appropriate for someone to come in and take a copy of the New York Times and just simply read the editorial sec-

> tion of the New York Times, that would have nothing to do with the City of Riviera Beach . . . .

Then, during the final charge, the court said:

> [I]f a chairperson [of the City Council] was saying to Mr. Lozman, Mr. Lozman, you need to sit down because we're only going to hear comments about the City of Riviera Beach, even if they didn't have that rule but if the person was doing that, exercising her discretion or his discretion as the chairperson that would *not* be discriminatory.

(Emphasis added.)

The jury returned a verdict in favor of the City on all counts. Lozman filed a Motion for New Trial, which the district court denied. This appeal followed.

II.

We review a district court's denial of a motion for new trial for an abuse of discretion. *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984). When ruling on a motion for new trial, a trial judge must determine "if in his opinion, the verdict is against the clear weight of the evidence or will result in a miscarriage of justice." *Id.* (quotation omitted and alteration adopted). "To assure that the judge does not simply substitute his judgment for that of the jury, . . . new trials should not be granted on evidentiary grounds unless, at a minimum, the verdict is against the great—not merely the greater—weight of the evidence." *Id.* (quotation omitted and alteration adopted).

"We review jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the objecting party." *Palmer v. Board of Regents*, 208 F.3d 969, 973 (11th Cir. 2000). When reviewing a trial court's jury instruction, "our task is to examine whether the jury charges, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled." *Id.* (quotation omitted). Reversal is warranted only if the failure to give an instruction prejudiced the requesting party. *Id.*

III.

A.

Lozman first argues that the district court erred in denying his motion for new trial because the jury's verdict finding probable cause to arrest for a violation of Fla. Stat. § 871.01 was against the great weight of the evidence.[3]

Probable cause "constitutes an absolute bar" to a claim for false arrest. *Rankin v. Evans*, 133 F.3d 1425, 1435 (11th Cir. 1998). That is true whether the false arrest claim is brought under the First Amendment, *Dahl v. Holley*, 312 F.3d 1228, 1236 (11th Cir. 2002), the Fourth Amendment, *Rankin*, 133 F.3d at 1430,

---

[3] The City argues Lozman waived this claim by failing to argue in his motion for new trial that the probable cause finding was against the great weight of the evidence. Reading Lozman's motion for new trial in light of our rule to construe *pro se* filings liberally, *see Tannenbaum v. United States*, 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam), we are not convinced he waived the issue. In any event, we need not rule on the City's waiver argument because we deny Lozman's claim on the merits

1435, or state law, *id.* at 1435. Thus, for all three false arrest claims, the district court instructed the jury that, in order to find in favor of Lozman, the jury had to find that "the arresting officer lacked probable cause to believe that Mr. Lozman had or was committing a crime." The jury was instructed, more specifically, to consider whether the officer had probable cause to arrest Lozman for the offense of Disturbing a Lawful Assembly, Fla. Stat. § 871.01(1). By finding for the City on the three false arrest claims, the jury thus found Officer Aguirre did have probable cause to arrest Lozman for disturbing a lawful assembly under § 871.01(1).

Lozman argues the district court erred in denying his motion for new trial because the jury's finding of probable cause was against the great weight of the evidence. We disagree. In order for probable cause to exist, "an arrest must be objectively reasonable under the totality of the circumstances." *Rankin*, 133 F.3d at 1435 (quotation omitted and alteration adopted). This standard is met when "the facts and circumstances within the officer's knowledge, of which he or she has reasonably trustworthy information, would cause a prudent person to believe, under the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Id.* (quotation omitted).

To obtain a conviction under § 871.01(1), the State must prove three elements: (1) the defendant "must have deliberately acted to create a disturbance[,] [t]hat is, he must act with the intention that his behavior impede the successful functioning of the assembly in which he has intervened, or with reckless disregard of

the effect of his behavior"; (2) "[t]he acts complained of must be such that a reasonable person would expect them to be disruptive"; and (3) "the acts must, in fact, significantly disturb the assembly." *S.H.B. v. State*, 355 So. 2d 1176, 1178 (Fla. 1977).

Based on the evidence before the jury—especially the video footage of Lozman's conduct at the City Council meeting—the jury could have found that Officer Aguirre reasonably believed Lozman was committing, or was about to commit, the offense of Disturbing a Lawful Assembly. The video shows Lozman interrupted and refused to listen to Councilperson Wade when she tried to admonish him; Lozman refused to leave the podium when Officer Aguirre first asked him to "walk outside"; and Lozman then continued to refuse to leave after Officer Aguirre again directed him to "walk outside" or else be arrested. Because Lozman failed to heed Councilperson Wade and Officer Aguirre's directions, and repeatedly failed to leave the podium when directed to do so, Officer Aguirre could have reasonably believed: (1) that Lozman acted with "reckless disregard of the effect of his behavior"; (2) that "a reasonable person would expect [his conduct] to be disruptive"; and (3) that his conduct "significantly disturb[ed] the assembly," or was about to. *See S.H.B.*, 355 So. 2d at 1178. Thus, we cannot say the jury's finding that Officer Aguirre had probable cause to arrest Lozman for a violation of § 871.01(1) went against the great weight of the evidence.

B.

Next, Lozman argues the district court erred in its jury instruction on the First Amendment retaliatory arrest claim, specifically, the part of the instruction on

retaliatory animus. The court instructed the jury that, in order to find for Lozman on this claim, the jury had to find that *Officer Aguirre* possessed a retaliatory animus. However, Lozman's theory at trial was that it was Councilperson Wade—not Officer Aguirre—who was the City official with the retaliatory animus. Lozman claimed that Councilperson Wade caused his arrest by summoning Officer Aguirre to the podium and then directing Officer Aguirre to "carry [Lozman] out." Lozman argues he was entitled to have the jury instructed on this theory of animus and causation, and that the district court erred by instructing the jury that Officer Aguirre was the City official whose animus (or lack thereof) was dispositive of the First Amendment claim.

Lozman's argument is compelling, as he seems to have established a sufficient causal nexus between Councilperson Wade and the alleged constitutional injury of his arrest. *See Rizzo v. Goode*, 423 U.S. 362, 370-71, 96 S. Ct. 598, 604 (1976) ("[Section 1983] impose[s] liability . . . for conduct which 'subjects, or causes to be subjected' the complainant to a deprivation of a right secured by the Constitution and laws." (quoting 42 U.S.C. § 1983) (emphasis added)); *Sims v. Adams*, 537 F.2d 829, 831 (5th Cir. 1976)[4] ("The language of § 1983 requires a degree of causation . . . but it does not specifically require 'personal participation.'"). However, even assuming Lozman is right that it was error to restrict the jury's animus inquiry to Officer Aguirre, this error was harmless in light of the

---

[4] Under *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc), we are bound by all decisions of the former Fifth Circuit handed down before October 1, 1981. *Id.* at 1209.

probable cause finding. *See United States v. Webb*, 655 F.3d 1238, 1249 n.8 (11th Cir. 2011) ("Jury instructions are subject to harmless error review."). The jury's determination that the arrest was supported by probable cause defeats Lozman's First Amendment retaliatory arrest claim as a matter of law. *See Dahl*, 312 F.3d at 1236.

C.

Finally, Lozman argues the district court erred in its jury instructions about the City's authority to restrict public comment at City Council meetings.[5]

In order to prevail on a First Amendment retaliation claim, "the plaintiff must show that the defendant was subjectively motivated to take the adverse action because of the protected speech." *Castle v. Appalachian Tech. Coll.*, 631 F.3d 1194, 1197 (11th Cir. 2011). Lozman claimed the City had him removed and arrested because he opposed the redevelopment plan. As its defense, the City presented evidence that Lozman was removed—regardless of his opposition to the redevelopment plan—simply because his comments violated the rules governing the non-agenda public comment period of City Council meetings. More specifically, the City argued Lozman's remarks about the arrest of a county commissioner violated the rule that comments during the non-agenda public comment period, while not limited to an agenda item, must still relate to City

---

[5] The City argues Lozman waived this claim by failing to argue it before the District Court. Again, although we are not convinced that he waived the issue, *see Tannenbaum*, 148 F.3d at 1263, we need not rule on the City's waiver argument because we deny the claim on the merits.

business. Lozman countered with testimony showing no such requirement existed and that, during the public comment period, residents could speak on any topic, whether related to City business or not. Thus, one of the fact issues for the jury was whether a person during the public comment period could speak only about a topic related to City business. The district court instructed the jury, both during trial and in its final charge, that the First Amendment would not prohibit a city from imposing this sort of restriction if it wanted to.

Lozman argues that two comments the district court made while offering instructions on this subject were error. First, during Lozman's testimony, the court said, "it would not be appropriate for someone to come in [to a City Council meeting] and just simply read the editorial section of the New York Times, that would have nothing to do with the City of Riviera Beach." Then, during the final charge, the court said, "even if [the City Council] didn't have [a] rule" restricting public comment to topics related to City business, it "would not be discriminatory" for the Council chairperson to "exercis[e] her discretion" to say "Mr. Lozman, you need to sit down because we're only going to hear comments about the City of Riviera Beach." Lozman argues these statements effectively told the jury that the City was merely enforcing a valid rule barring speech about non-City matters, instead of allowing the jury to decide whether such a rule existed and whether this rule was what motivated the City's adverse action against Lozman.

Read out of context, it might seem that the district court's comments could have confused the jury by sug-

gesting that the issue of causation—that is, whether the City acted out of an improper retaliatory motive or a legitimate enforcement of its rules—was determined as a matter of law in favor of the City. But these were two isolated remarks, and each was accompanied by a lengthy discussion that clearly presented the fact issue for the jury to decide. After saying "it would not be appropriate" to read The New York Times during the public comment period, the district court continued:

> The jury is going to have to decide what was in the City Council's mind when they [took the adverse action]. Were they trying to retaliate against him because of something he said before? Or were they saying, You're not obeying our rule today, and you need to stop. See? That's what the jury is going to have to decide.

Similarly, after saying it "would not be discriminatory" for the Council chairperson to "exercis[e] her discretion" to remove Mr. Lozman for speaking about non-City matters, the court explained:

> You're looking at what is in the mind of the person making the decision. So if the chairperson says to Mr. Lozman, you need to sit down, if [the chairperson is] doing it because they believe they're enforcing a rule of procedure, and they're not doing it to strike back at Mr. Lozman, then Mr. Lozman would not have established a discriminatory animus. But if Mr. Lozman has proven to you that they did have a discriminatory animus then he would have established that fact no matter what they say. In other words, just because someone says, wait a minute, you're violating this rule or that

> rule, if what's really in their mind is that they're trying to strike back at Mr. Lozman, that would not be appropriate. That would not be permissible. So remember when we're talking about discriminatory animus we are looking at what is in the mind of the person making that decision. Are they just trying to run an orderly meeting or are they trying to strike back at Mr. Lozman because he engaged in constitutionality protected speech or conduct?

Taking the court's instructions "as a whole," the two comments Lozman complains of would not have misled the jury. *Christopher v. Cutter Labs.*, 53 F.3d 1184, 1190 (11th Cir. 1995); *see also Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1283 (11th Cir. 2008) ("When the instructions, taken together, properly express the law applicable to the case, there is no error even though an isolated clause may be inaccurate, ambiguous, incomplete or otherwise subject to criticism." (quotation omitted)). The district court correctly stated the law concerning the City's authority to restrict public comment during its Council meetings. Further, the court correctly advised the jury that, even if the City claimed to be enforcing such a restriction, the jury would need to decide whether this was pretext for a retaliatory motive. "So long as the instructions accurately reflect the law, the trial judge is given wide discretion as to the style and wording employed in the instructions." *Palmer*, 208 F.3d at 973. The district court was well within its discretion to phrase the instructions as it did.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-CIV-80134-HURLEY

FANE LOZMAN,

Plaintiff,

vs.

CITY OF RIVIERA BEACH,

Defendant.

_____/

ORDER DENYING IN PART AND GRANTING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT & DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff Fane Lozman ("Lozman") filed a Second Amended Complaint against the City of Riviera Beach ("the City") pursuant to 42 U.S.C. § 1983, alleging that the City, through the actions of its city council members, retaliated against him for criticizing a municipal redevelopment project and opposing what he perceived as improper conduct of various council members, in violation of his First, Fourth and Fourteenth Amendment rights under the United States Constitution. He also asserts supplemental state law claims against the City for false arrest, battery and conversion.

The case is now before the court on the parties' cross-motions for summary judgment [DE Nos. 383, 408]. For reasons discussed below, the court will grant in part and deny in part the City's motion for

summary judgment, and will deny Mr. Lozman's motion for partial summary judgment.

I. Factual Background[1]

In March, 2006, Mr. Lozman moved to Riviera Beach and leased a slip at the city's marina for his "floating home," a two-level, house-like plywood structure with empty bilge space underneath the main floor to keep it afloat. Shortly after taking up residence, Mr. Lozman learned of the City's interest in a $2.4 billion redevelopment project for the marina, a plan contemplating the seizure of thousands of homes through the power of eminent domain and the transfer of property to a private developer.

Lozman was publicly critical of the City's redevelopment plan, as well as the corruption that he perceived was prevalent throughout the City's government, and routinely voiced those criticisms at public meetings of the Riviera Beach City Council and the Riviera Beach Community Redevelopment Agency (CRA) between the years 2006 – 2013.

---

[1] The Background Facts are either undisputed, or read in the light most favorable to the plaintiff, as the nonmoving party, as they relate to the defendant's motion for summary judgment on the constitutional and supplemental state law claims, even though the facts accepted at the summary judgment stage of the proceeding may not be the actual facts of the case. *Davis v Williams*, 451 F.3d 759, 763 (11th Cir. 2006). Conversely, in determining the plaintiff's cross-motion for partial summary judgment on the conversion claim, the court views the facts relating to that claim in the light most favorable to the defendant, in its evaluation of the plaintiff's cross motion for summary judgment.

On May 10, 2006, Riviera Beach police officers, acting at the direction of the City Council Chairperson, forcibly removed Lozman from a regularly scheduled meeting of the city council. Later that evening, the city council denied him access to a "special meeting" of the council. A few weeks later, on June 7, 2006, Lozman filed suit in state court against the City and various city council members alleging a violation of Florida's Government-in-the-Sunshine Act based on its closure of this meeting.

On June 28, 2006, the city council held a scheduled closed-door executive session. A transcript of that proceeding, which has since been made a public record, reveals at least two members of the city council discussing the need to find out who was behind Lozman's Sunshine Act suit, and "to use every reasonable tool that we have to find out who they are, what we are up against, so that we can map our strategy out." [DE 383-10, p. 36]. Responding to these comments, council member Elizabeth Wade said:

> I think it would help to intimidate the same way as FDLE is coming to my house. I am wondering if my lines are tapped or whatever. I think they should be questioned by some of our people on a legitimate pay scale basis so that they can feel the same kind of unwarranted heat that we are feeling, and I am going to caution that the city has been there before . . . It is the climate . . . . We can go in there and be as right as right can be, but if that Judge is already preconcluded [sic], you got the governor's hand in this, or supposedly in this, because all we have got is hearsay that his hand is in it. You understand what I

am saying? You got FDLE knocking at my door.

[DE 383-10, pp. 37-38]. The Council Chairperson, Ann Isles, later wrapped up the discussion with the comment, "I would like to offer up a consensus that we spend whatever. If you need a private investigator, whatever you need. If you need somebody to shadow every name that's on this document, I ask for a consensus that we spend those dollars and get it done, so we send one message. This is our house, and we are going to stay, and there ain't none of them going to run us away." [DE 383-10, p. 43]. When Ms. Iles then asked "Do we have a consensus of what Ms. Wade is saying," council member James Jackson responded, "I think what Ms. Wade says is right. We have to beat this thing, and whatever it takes, I think we should do it." City Attorney Pamela Ryan responded "Okay," as did council member Norma Duncombe. [DE 383-10, pp. 44].

As expressed at the outset of this closed door executive discussion, multiple council members shared a concern about who was funding Lozman's Sunshine Act suit, and whether there was connection between Lozman and the offices of then Governor Bush and Attorney General Crist, governmental bodies which had also been critical of the city's redevelopment project and which the council suspected may have cooperated with Lozman in his pursuit of the Sunshine Act Lawsuit.

Although there is no record evidence that the City actually hired a private investigator to investigate or follow Lozman, the record does show that shortly after the conclusion of this closed-door meet-

ing, Lozman became the target of a string of legal pressures applied by the city council or its police department, summarized here as follows:

(a) On September 11, 2006, the City filed an eviction action in state court seeking to evict Lozman's floating home from the marina. Lozman successfully asserted a First Amendment retaliation defense to the eviction action, and the City lost its bid to evict the structure from its marina.

(b) On November 15, 2006, then Riviera Beach City Council Chairperson Elizabeth Wade directed city police officers to forcibly remove Lozman from the podium during the public comment, "non-agenda" section of a city council meeting, within less than a minute after Lozman began speaking about the U.S. Attorney's Office current efforts to crack down on public corruption in Palm Beach County and the recent arrest of Palm Beach County Commissioner Tony Massilloti. Responding to the Chairperson's direction, Officer Francisco Aguirre handcuffed Lozman during the middle of his speech, escorted him from the meeting and transported him to the City of Riviera Beach police headquarters, where Lozman was charged with disorderly conduct and trespass after warning. Sometime later, the charging document was altered, with a "white-out" of the trespass charge, and replacement with the words "resisting w/out violence, to wit obstruction." Ultimately, on January 17, 2007, the Palm Beach County State Attorney's office *nolle prossed* both charges.

(c) Over the course of the next several years, City of Riviera Beach police officers stopped Lozman on at least 15 different occasions, threatening to arrest him

for walking his 10-pound dachshund on marina property.

(d) Over the course of the next several years, Lozman was repeatedly escorted from city council or CRA meetings, the City Hall building or the City Council Chambers by Riviera Beach police officers acting at various times under the direction of city council members Liz Wade, Ann Isles, Cedrick Thomas, Dawn Pardo and Gloria Shuttlesworth. On those occasions when he was not physically removed, council members "censured" or silenced Lozman by interrupting his remarks or threatening police intervention.

(e) On July 9, 2008, Lozman's former attorney, Robert Bowling, sent a formal written "notice of claim" to the City, pursuant to § 768.28(6), Fla. Stat., asserting First Amendment, Fourth Amendment and Fourteenth Amendment violations, as well as a state law claim of false arrest, based on Lozman's November 15, 2006 arrest, and the City's forcible removal of Lozman from the May 2006 regular meeting of the city council, as well as various other unspecified retaliatory acts of censure and antagonism.

(f) On April 1, 2009, the City cut off Lozman's electricity at the marina for a period of nearly three weeks, finally restoring it on April 20th, three days after being ordered to do so by a state court judge.

(g) On April 20, 2009, the City initiated an *in rem* federal admiralty action against Lozman's floating residence in the United States District Court for the Southern District of Florida. The City requested and obtained an *ex parte* arrest warrant authorizing the seizure of Lozman's floating home, without disclosing

that Lozman had prevailed in a prior state eviction proceeding initiated by the City, and that just three days earlier a state court judge issued an order directing the City to restore electricity to the floating home.

When Lozman and a local television cameraman witnessed the arrest of the structure and attempted to film the procedure, from the vantage point of a nearby public parking lot, a Riviera Beach Police Commander approached them and, in a loud voice, threatened to arrest them both if they did not stop the filming.

(h) On October 21, 2009, then City Council Chairperson Dawn Pardo directed two police officers to remove Lozman from a City Council meeting for failing to yield the podium. Lozman claims that the officers threw him to the floor in the process of forcibly removing him from the meeting, while Pardo, City Attorney Pamela Ryan and other members of the city council laughed and mocked him in his stricken state.

(i) On November 18, 2009, the United States District Court, exercising its admiralty jurisdiction, entered partial summary judgment in favor of the City, and on January 6, 2010, entered final judgment against the *in rem* defendant, i.e., the floating home, which the court ruled was a "vessel," in the amount of $3,039.88, plus custodial fees, and further ordered that the "vessel" be sold at a U.S. Marshal sale to pay the judgment. *City of Riviera Beach v. That certain unnamed gray, two story vessel approximately fifty-seven feet in length, etc., in rem*, Case No. 09-80594-Civ-Dimitrouleas (S.D. Fla. 2010) [DE 159]. On Feb-

ruary 9, 2010, the City purchased the floating home at a U.S. Marshal's public auction in Miami, outbidding the public that attended the auction, and subsequently destroyed it at a cost of $6,900.00.

(j) In the interim, Lozman's appeal of the district court's final judgment worked its way to the United States Supreme Court, which ultimately determined, by opinion issued January 15, 2013, that Lozman's floating home was not a vessel for purposes of admiralty law, and that the district court therefore lacked subject matter jurisdiction over the City's action. *Lozman v. City of Riviera Beach, Florida,* ___ U.S. ___, 133 S. Ct. 735 (2013). On September 25, 2013, on remand from the United States Court of Appeals for the Eleventh Circuit Court, the district court dismissed the action for lack of subject matter jurisdiction. *City of Riviera Beach v. That certain unnamed gray, two story vessel, etc.*, Case No. 09-80594-Civ-Dimitrouleas [DE 210].

II. Plaintiff's Complaint

Based on the foregoing allegations, Plaintiff's Second Amended Complaint asserts six constitutional claims against the City under 42 U.S.C. § 1983: (1) a First Amendment retaliation claim based on the City's alleged retaliatory lawsuits, arrests and campaign of harassment; (2) a First Amendment right to petition claim based on the City's alleged interference with Lozman's right to petition the government for redress of grievances; (3) a Fourth Amendment unlawful seizure claim based on the City's alleged false arrest of Lozman's person; (4) a Fourth Amendment unlawful seizure claim based on the City's alleged unlawful false arrest and seizure of Lozman's floating

home; (5) a Fourteenth Amendment Substantive Due Process and Procedural Due Process claim based on the City's alleged implementation of a punitive, retaliatory legal campaign designed to deprive Lozman of his right to petition the government and exercise free speech; (6) a Fourteenth Amendment Equal Protection claim based on the City's alleged selective and discriminatory enforcement of city ordinances, regulations and rules against Lozman. In addition, Lozman's Second Amended Complaint includes three supplemental state law claims for false arrest, battery, and conversion.

In earlier formulations of his complaint, Lozman named as defendants the City of Riviera Beach, the City of Riviera Beach Community Redevelopment Authority (CRA), and numerous individual members of the Riviera Beach City Council. In his now operative Second Amended Complaint, Lozman has dropped all of the previously named individual city council members as well as the CRA as party defendants, leaving only the City of Riviera Beach named as a defendant to this cause.

Because the City of Riviera Beach is a municipal entity, it can be held liable under § 1983 only if the alleged constitutional violations resulted from the execution of the City's own policies. *Monell v. Dept. of Social Services of the City of New York,* 436 U.S. 658 (1978); *City of St. Louis v. Praprotnik,* 485 U.S. 112 (1988). This "official policy" requirement is designed to distinguish acts of the municipality from acts of the employees of the municipality, and to make it clear that municipal liability is limited to action for which the municipality is actually responsible.

To establish the existence of a municipal policy or custom which caused a constitutional violation, the plaintiff in a § 1983 suit may alternatively proceed with proof of: (1) an express policy which caused the constitutional deprivation; (2) a widespread practice or custom which, although not authorized by written or express municipal policy, is so permanent and well-settled that it constitutes a policy, or (3) a constitutional deprivation directed or caused by a person vested with final decision or policy-making authority on behalf of the municipality. *Kujawski v. Board of Com'rs of Bartholomew County, Ind.*, 183 F.3d 734 (7th Cir. 1998).

Where, as here, a policy maker is comprised of a public body consisting of multiple board members, a majority of the members of the council constitutes a final policymaker for purposes of creating *Monell* liability. *Campbell v. Rainbow City, Ala.* 434 F.3d 1306 (11th Cir. 2006); *Matthews v. Columbia County*, 294 F.3d 1294 (11th Cir. 2002); *Mason v Village of el Portal*, 240 F.3d 1337, 1339 (11th Cir. 2001). Accordingly, Lozman may maintain his § 1983 action against the City under a "final policy maker" theory of *Monell* liability only if he shows that the retaliatory actions complained of were directed or authorized by a majority of City Council members who harbored an illegal motivation to punish and deter Lozman from his public advocacy against the City.[2]

---

[2] The City of Riviera Beach is governed by a mayor and a five-member city council, for a total of six persons. The mayor serves as the *de facto* chairperson, and votes only in case of a tie or filling a council person vacancy. Under the City Charter, the affirmative vote of a majority of the members present at any meeting is required to adopt any ordinance, resolution, order or

III. Standard of Review

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. *Id.*

A party seeking summary judgment bears the initial responsibility for advising the court of the basis for its motion, and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v Catrett,* 477 U.S. 317, 322 (1986). The moving party must establish that there is not triable issue of fact as to all the elements of any issue on which the moving party bears the burden of proof at trial.

In contrast, where the nonmoving party bears the burden of proof on a particular issue at trial, the moving party's initial burden under *Celotex* can be met simply by demonstrating that "there is an absence of evidence" to support the nonmoving party's case. *Celotex,* 477 U.S. at 325. After the nonmoving party meets its initial burden, "the adverse party's response, by affidavits or otherwise, must set forth specific facts showing that there is a genuine issue

---

vote. Thus, the affirmative participation of at least three of the five council members is required for any city action.

for trial." Fed. R. Civ. P. 56(c). Thus, summary judgment is appropriate if the nonmoving party fails to make a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

Put another way, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a motion for summary judgment looks beyond the pleadings and requires the nonmoving party – by affidavits, depositions, interrogatory answers or admissions on file – to designate specific facts showing that there is a genuine issue for trial. *Celotex,* 477 U.S. at 324. The nonmoving party may not restate allegations made in its pleadings or rely upon "self-serving conclusions, unsupported by specific facts in the record." *Id.* Rather the nonmoving party must support each essential element of its claims with specific evidence from the record. *Celotex*, 477 U.S. at 322.

Further, evidence introduced to defeat or support a motion for summary judgment must be sworn, competent and on personal knowledge, and set out facts that would be admissible at trial. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991); *Callahan v. A.E.V., Inc.,* 182 F.3d 237, 252 n. 11 (3d Cir. 1999).

The court must view the evidence presented on the motion in the light most favorable to the opposing party, and make every reasonable inference in favor of that party. *Sims v. MVM, Inc.*, 704 F.3d 1327, 1330 n. 2 (11th Cir. 2013). The standards governing cross-motions for summary judgment are the same, although the court must construe the motions inde-

pendently, viewing the evidence presented by each moving party in the light most favorable to the nonmovant. *Shazor v. Professional Transit Management, Ltd.*, 744 F.3d 948 (6th Cir. 2014).

IV. Discussion

A. Constitutional Claims

Section 1983 of Title 42 of the United States Code offers private citizens a means of redress for violations of federal law by state officials. 42 U.S.C. § 1983. The statute provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State . . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Id. "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1982). To establish a claim under this section, the plaintiff must show a deprivation of "a right secured by the Constitution and laws" of the United States by a person acting under color of state law.

1. First Amendment Retaliation Claims

An individual has a viable First Amendment claim against the government when he is able to prove that the government took action against him in

retaliation for his exercise of First Amendment rights. *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-284 (1977). A plaintiff who brings a retaliation claim under §1983 predicated on the First Amendment must show: (1) he or she engaged in constitutionally protected activity; (2) the defendant's responsive actions were motivated or substantially caused by the exercise of that right, i.e. there was a causal connection between the protected activity and the retaliatory action, and (3) the defendant's retaliatory actions were sufficient to deter a person of ordinary firmness from exercising his or her constitutional rights, i.e. the defendant's actions effectively chilled the exercise of the plaintiff's First Amendment right. *Curley v. Village of Suffern*, 268 F. 3d 65, 73 (2d Cir. 2001); *Thomas v. Independence Township*, 463 F.3d 285, 296 (3d Cir. 2006).

To prove causation, a plaintiff must prove that his speech was the "but-for" cause of the allegedly retaliatory action, *Fairley v. Andrews,* 578 F.3d 518 (7th Cir. 2009), which may be accomplished with proof of: (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory act, or (2) a pattern of antagonism coupled with timing to establish a causal link. *Lauren W. ex rel. Jean W. v. DeFlaminis,* 480 F.3d 259, 267 (3d Cir. 2007); *Hunt-Golliday v. Metropolitan Water Reclamation Dist. of Greater Chicago,* 104 F.3d 1004 (7th Cir. 1997) (pattern of criticism and animosity by supervisors following protected activities supported existence of causal link in Title VII retaliation claim). "In the absence of that proof the plaintiff must show that from the 'evidence gleaned from the record as a whole' the trier of the fact [sic] should infer causa-

tion.'" *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281 (3d Cir. 2000).

In this case, the Plaintiff's First Amendment retaliation claim is premised on a series of retaliatory actions – one arrest, multiple threatened arrests, repeated expulsion from public meetings of the city council, an eviction action, an *in rem* action against his floating home, and ultimately the destruction of his floating home – allegedly taken by the City in response to (1) the 2006 lawsuit brought by Plaintiff against the City under Florida's "Government in the Sunshine Act," charging the improper conduct of official municipal business behind closed doors; (2) the Plaintiff's public criticism of the City's proposed redevelopment plan, (3) the Plaintiff's public criticism of the integrity of various municipal officials. The Second Amended Complaint pleads facts, and the summary judgment record contains evidence, showing that Plaintiff regularly attended public meetings of the City of Riviera Beach City Council, and its related arm, the City of Riviera Beach Community Redevelopment Authority (comprised of the same individuals who served on the City Council); that he engaged in expressive political speech during those meetings; that he engaged in protected petition activity by filing his Sunshine Act suit against the City; that he was arrested or threatened with arrest contemporaneously or shortly after engaging in this protected activity, and that he was sued in state and federal court by the City in an attempt to evict his person and floating residence from the City marina shortly after engaging in this protected activity.

The City contends that Lozman's arrests were justified, and therefore cannot form the premise of an

unlawful retaliation claim. If, in fact, a § 1983 plaintiff was engaged in the commission of a crime when he was arrested, his First Amendment interests necessarily yield, and inquiry into the government's motive for making the arrest becomes unnecessary. *Curley v. Village of Suffern*, 268 F.3d 65 (2nd Cir. 2001). However, in this case, the record suggests, at a minimum, a genuine issue of material fact on the question of whether City of Riviera Beach police officers had probable cause to arrest Plaintiff for disorderly conduct or resisting arrest without violence during the November 2006 arrest incident alleged in the complaint. Therefore, the fact of Plaintiff's arrest does not eliminate further inquiry into the causation element of his First Amendment retaliation claim to the extent based on the false arrest of his person.

There is also record evidence of a very close temporal connection between the timing of Plaintiff's expressive speech and the filing of the Sunshine Act suit, and the City's exertion of an extended string of legal pressures against Lozman – proximity in time which constitutes some circumstantial evidence of improper motive behind the City's actions. That is, the record plainly shows that Lozman was engaged in expressive political speech, as well as the valid exercise of his right to petition the government, at a time just prior to the adverse municipal actions alleged. This is adequate circumstantial evidence of causation to survive summary judgment on Plaintiff's First Amendment retaliation claims. *Jones v. Parmley,* 465 F.3d 46, 56 (2d Cir. 2006).

This leaves the issue of the City's *Monell* liability as the final element of the Plaintiff's § 1983 First Amendment retaliation claim under challenge by the

City's current motion for summary judgment. As stated above, under *Monell,* a municipality cannot be held liable solely because it employs a tortfeasor – i.e. it cannot be held liable on a *respondeat superior* theory. *Monell,* 436 U.S. at 691. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. *Id.*

The word "policy" implies a course of action consciously chosen from various alternatives. In the *Monell* sense, a policy may be expressly chosen by a municipal body, e.g. by statute, regulation, rule or ordinance; the existence of an official policy may be inferred from municipality inaction or "deliberate indifference" in the face of a widespread custom or usage of constitutional deprivations perpetuated by municipal employees or agents; or, a person vested with final decision-making authority on behalf of the municipality can take action which is said to constitute municipal policy.

With regard to final decision-maker theory, the court finds, first, that the record contains evidence reasonably susceptible to inference that the Council Chairperson in 2006, Elizabeth Wade, harbored illicit motivation to punish and deter Lozman based on his exercise of free speech and petition of government, and that a majority of the city council members in attendance at that time – and a majority of members constituting later formulations of the council – approved and endorsed Wade's retaliatory sentiments when they initiated, endorsed, or directed a series of legal pressures against Lozman – including the at-

tempted eviction from the marina, the arrest and threatened arrests, the seizure and destruction of Lozman's floating residence, the termination of his electricity, and the invasion of his privacy by unauthorized photography of his person inside of his home. That Lozman became the target of this extended string of legal pressures shortly after he filed his Sunshine Act suit and shortly after he began criticizing the city's municipal policies is some circumstantial evidence that a majority of members on the city council harbored the illegal retaliatory motivation expressed by Council Chairperson Wade, at least enough to raise a jury issue on the question of whether a majority of the council acted with unlawful motivation when it authorized and initiated legal proceedings to remove Lozman and his floating home from the City of Riviera Beach marina community. At trial, the Plaintiff will have the burden of demonstrating that each alleged retaliatory action represented an action taken with the support of at least three council persons harboring such illegal motivation; for summary judgment purposes, the court finds sufficient circumstantial evidence on record to raise a jury question on this *Monell* element of claim. *Schlessinger v. The Chicago Housing Authority*, 2013 WL 5497254 (N. D. Ill. 2013).

Alternatively, the record is also susceptible to a finding of an unconstitutional policy, either express or as applied, in the embodiment of the city council's "Rules of Decorum" invoked as a basis for Lozman's expulsion from various city council meetings. If the relevant "Rules of Decorum" on their face, or as applied to Lozman, constituted an unreasonable restriction on Lozman's First Amendment right of free ex-

pression in the subject forum, to wit, the public comment, non-agenda portion of open city council meetings, these rules may serve as evidence of an express municipal policy which caused the First Amendment deprivations complained of by Lozman, thereby satisfying the *Monell* element of his First Amendment retaliation claim.

The City questions whether the correct rules have been cited by Plaintiff (i.e. whether he has cited the rules in effect at the time of the alleged constitutional infringements), but does not affirmatively show that the rules in effect during the relevant city council meetings are different in any material respect from the rules referenced by Plaintiff, nor has either party addressed the constitutional permissibility of the substantive content of the rules, facially or as applied, in their respective briefing on the current motions for summary judgment. On this record, the court finds a genuine issue of material fact on the content of the relevant "Rules of Decorum," as well as a mixed fact/law issue on the question of whether these rules evince an unconstitutional express policy of the City which caused the First Amendment constitutional deprivations alleged, thereby establishing the *Monell* liability element of claim.

The City also argues that Lozman's complaint does not sufficiently allege the existence of an express municipal policy based on the City Council's formal "Rules of Decorum," so as to put the City on fair notice of this theory of liability, and that it would be unfair to allow expansion of the pleadings at the summary judgment stage to accommodate this alternative theory of *Monell* liability. The court is not persuaded by this notice argument, however. The Plain-

tiff's Second Amended Complaint does allege that the complained of conduct was taken "pursuant to a custom, policy or decision made by a governmental official with final policymaking authority" [Second Amended Complaint, ¶ 40], an allegation which subsumes the theory that the complained of conduct was the product of an express policy promulgated by a final decision maker.

As a third alternative premise of *Monell* liability, the court also finds sufficient evidence to withstand summary judgment on the issue of widespread practice or custom of constitutional deprivations perpetrated by the city agents or employees against Lozman, from which the existence of an official municipal policy may be inferred. While the defendant contends that multiple constitutional deprivations directed toward a single individual is not sufficient to constitute a "custom and practice" evidence in the *Monell* sense, and that a § 1983 plaintiff suing a municipality must instead show a series of unrelated incidents involving different persons to show informal practice or custom, it does not cite any legal authority for this proposition. Further, there is nothing in the policy rationale underpinning *Monell* which would support such a formulation of the rule.

Under *Monell*, a policy may be inferred from circumstantial proof that a municipality displayed a deliberate indifference to the constitutional rights of an individual, either by failing to train its employees, or by a repeated failure to make any meaningful investigation into multiple complaints of constitutional violations after receiving notice. *Ricciuti v. N.Y.C. Transit Authority*, 941 F. 2d 1119, 1123 (2d Cir. 1991). Whether a municipality's failure to respond

involved a string of unrelated incidents involving different people, or a string of related incidents involving the same individual – the logical inference available from such a course of "deliberate indifference" is the same, i.e. that the municipality encouraged, or at least condoned, a course of unconstitutional activity by failing to take action to deter or eliminate it. Thus, "repeated, constitutional failures with respect to one individual 'as well as a culture that permitted and condoned violations of policies' may be sufficient to withstand summary judgment on a *Monell* claim." *Mayes v. City of Hammond, Indiana,* 2006 WL 2193048 (N.D. Ind. 2006) (quoting *Woodward v. Correctional Med. Servs. of Illinois*, 368 F.3d 917, 929 (7th Cir. 2004)).

In this case, the basis for *Monell* liability on a custom and practice theory is not premised solely on the City's alleged extended retaliatory course of legal pressure and harassment directed toward Lozman, but rather is the combination of the multiple alleged retaliatory acts and deprivations made in an alleged attempt to eliminate Lozman from the marina community, along with evidence of a culture that permitted and condoned the constitutionally impermissible retaliatory gestures, including the City of Riviera Beach's apparent lack of any policies or protocols concerning the proper handling of alleged Sunshine Act violations and appropriate litigation conduct toward the litigants involved.

In this case, there is ample evidence from which a jury could reasonably conclude that the City was on notice of one arrest and multiple threatened arrests lacking probable cause, as well as a series of legal actions prompted by questionable animus from a con-

stitutional standpoint, endorsed or initiated by various members of the city council, and that by failing to investigate and take any remedial action to deter the misconduct, the City encouraged or condoned the misconduct, effectively adopting it as its own. Thus, the court finds facts which may support Plaintiff's assertion that a municipal policy based on custom and policy exists, and caused the claimed constitutional injuries. *Estate of Novack ex rel. Turbin v. County of Wood,* 226 F.3d 525, 530 (7th Cir. 2000); *Woodward v Correctional Med. Servs. of Illinois, Inc.,* 368 F.3d 917 (7th Cir. 2004). The court shall accordingly deny the City's motion for summary judgment on the First Amendment retaliation claims under § 1983.

2. Fourth Amendment Claims

Plaintiff asserts two distinct Fourth Amendment claims against the City – one for false arrest of his person, and the other for false arrest of his floating home.

A warrantless arrest without probable cause violates the Constitution and forms the basis for a § 1983 claim. *Marx v. Gumbinner*, 905 F.2d 1503, 1505 (11th Cir. 1990). Conversely, if an arrest is supported by probable cause, the arrestee is absolutely barred from pursuing a § 1983 false arrest claim. *Id* at 1505-06. A false arrest claim under § 1983 is substantially the same as a claim for false arrest under Florida law. A plaintiff must prove three elements to sustain a claim for false arrest under Florida law: (1) an unlawful detention and derivation of liberty against the plaintiff's will; (2) an unreasonable detention which is not warranted by the circumstances and

(3) an intentional detention. *Tracton v. City of Miami Beach*, 616 So.2d 457 (Fla. 3d DCA 1992). Probable cause may be raised as an affirmative defense to a claim for false arrest; that is, an arrest of a criminal suspect by an officer acting with probable cause is a privileged detention. *Id.*, citing *Lee v. Geiger*, 419 So.2d 717 (Fla. 1st DCA 1982), *rev. den* 429 So.2d 5 (Fla. 1983). Probable cause exists "if at the moment the arrest was made, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense." *Holmes v. Kucynda*, 321 F.3d 1069, 1079 (11th Cir. 2003).

Probable cause is evaluated from the viewpoint of a prudent, cautious police officer on the scene at the time of the arrest. *Miami-Dade County v. Asad*, 78 So.3d 660 (Fla. 3d DCA 2012). Hindsight may not be employed in determining whether a prior arrest was made on probable cause; thus, events that occur subsequent to the arrest are irrelevant in assessing a false arrest claim. *Id.* To show probable cause, the arresting officer must have had reasonable grounds to believe that the arrestee committed a crime. The test is an objective one, i.e. a probable cause determination considers whether the objective facts available to the officer at the time of arrest were sufficient to justify a reasonable belief that an offense was being committed. *United States v. Gonzalez*, 969 F.2d 999, 1003 (11th Cir. 1992). Because it is objective, the determination is made without regard to the individual officer's subjective motive or belief as to the existence of probable cause.

In this case, the City argues that the Plaintiff's § 1983 Fourth Amendment claim, based on the November 2006 arrest of his person, is legally insufficient because the arresting officer had probable cause to arrest Plaintiff for disorderly conduct and resisting arrest without violence.

As a threshold matter, there is a genuine issue of material fact as to whether the officer had probable cause to arrest Lozman for disorderly conduct at the time of the arrest incident in question. Florida Statutes, § 877.03, defines and proscribes "disorderly conduct" as follows:

> Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace of disorderly conduct shall be guilty of a misdemeanor of the second degree.

The Florida Supreme Court has narrowly construed this statute, so that as applied to verbal conduct, it applies only to words which by their very utterance inflict injury or tend to incite an immediate breach of the peace. *State v. Saunders*, 339 So.2d 641 (Fla. 1976). It also applies to words known to be false, reporting some physical hazard in circumstances where such a report would create a clear and present danger of bodily harm to others. That is, the statute has been narrowly interpreted to prohibit "fighting words" or shouting "fire" in a crowded theater. *A.S.C. v. State*, 14 So.3d 1118 (Fla. 5th DCA 2009). Notably, for purposes of the instant discussion, Flori-

da courts have consistently held that unenhanced speech alone will not support a conviction for disorderly conduct. *Id.*

There is no suggestion in the present record that Lozman's conduct precipitating his arrest incited others to breach the peace, or posed an imminent danger to others; thus there is a large question as to whether the arrest was supported by probable cause to believe he engaged in disorderly conduct, which, under *Saunders* and its progeny, requires something more than loud or profane language, or a belligerent attitude. *Miller v. State*, 667 So.2d 325, 328 (Fla. 1st DCA 1995). And, if there was no probable cause for Lozman's disorderly conduct arrest, there can be no probable cause for resisting arrest without violence, because the latter crime presupposes that the arrestee was the subject of a valid detention and arrest. This follows because every person has the right to resist, without violence, an unlawful arrest. *Robbins v. City of Miami Beach*, 613 So.2d 580 (Fla. 3d DCA 1993), citing *K.Y.E. v. State*, 557 So.2d 956 (Fla. 1st DCA 1990) (recognizing common law rule that a person may lawfully resist illegal arrest without using force or violence). In other words, if there was no probable cause for Lozman's arrest for disorderly conduct, or some independent crime, he could not lawfully be arrested for "resisting arrest without violence," because the latter is not a "stand alone" crime. *Lee v. State*, 368 So.2d 395 (Fla. 3d DCA 1979) (failure of state to prove that the arrest which defendant resisted was lawful made it necessary to reverse conviction for resisting arrest without violence).

Because the record, at best, reveals a genuine issue of material fact on the question of whether the

police officers had objective reason to believe Lozman was engaged in "disorderly conduct" at the time of the subject arrests, there is an issue as to whether his arrests were supported by probable cause, and the City is not entitled to summary judgment on the Fourth Amendment false arrest of the person claim.

With regard to the alleged false arrest of property claim, however, the City acted with the authority of the federal admiralty court when it arrested and seized Lozman's floating home, which the court finds, as a matter of law, constitutes "probable cause" for that arrest and seizure. That it was later determined the district court lacked subject matter jurisdiction to issue the order does not detract from the probable cause that existed at the time of the arrest. It is axiomatic that hindsight should not be used to determine whether a prior arrest or search was made with probable cause. *Miami-Dade County v Asad*, 78 So.3d 660 (Fla. 3d DCA 2012). Thus, events that occur subsequent to the arrest are irrelevant in a false arrest claim because whether a false arrest was made turns on whether there was probable cause at the time of the arrest; i.e. subsequent events cannot remove the probable cause that existed at the time of the arrest. *Id.*, citing *McCoy v. State*, 565 So.2d 860 (Fla. 2d DCA 1990).

Therefore, accepting the allegations of the Second Amended Complaint as true, and reading the record evidence in the light most favorable to Lozman, it is clear that the City had probable cause to arrest Lozman's floating home at the time of the arrest and seizure. The fact that the federal district court which issued the order was later found to have lacked subject matter jurisdiction over the matter, requiring it

to vacate its final judgment for the City, does not change the fundamental probable cause analysis for the Plaintiff's Fourth Amendment false arrest of property claim. The court shall accordingly grant the City's motion for summary judgment on this prong of the Plaintiff's § 1983 Fourth Amendment false arrest claim.

3. Fourteenth Amendment Equal Protection Claim

To plead a selective enforcement claim under the Equal Protection Clause of the Fourteenth Amendment, a plaintiff must proffer sufficient factual allegations to show that: (1) plaintiff was treated differently from other similarly situated individuals, and (2) such differential treatment was based on impermissible considerations, such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person. *Harlen Associates v. Incorporated Village of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001). The comparison must be to those who are "similarly situated in all material respects." *Shumway v. United Parcel Serv., Inc.*, 118 F.3d 60, 64 (2d Cir. 1997). Alternatively, to show a "class of one" equal protection claim where a plaintiff asserts that he was irrationally discriminated against on an individual basis, rather than as member of a particular group, the plaintiff must show he was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). To be "similarly situated," under this rubric, the comparators must be "*prima facie* identical in all relevant respects." *Grider v. City of Auburn, Ala.*, 618 F.3d

1240, 1264 (11th Cir. 2010); *Thorne v. Chairperson Fla. Parole Comm'n*, 427 Fed Appx 765, 771 (11th Cir. 2011).

The test for determining whether other persons similarly situated were selectively treated is whether a prudent person, looking objectively at the incidents, would think them roughly equivalent. *Penlyn Development Corp. v. The Incorporated Village of Lloyd Harbor*, 51 F. Supp. 2d 255, 264 (E.D.N.Y. 1999).

Plaintiff's selective enforcement claim in this case is based on allegations that other members of the audience at city council meetings who spoke critically of the City or the integrity of its City Council members were not similarly interrupted and forcibly removed from the podium; that other City marina residents who did not publicly advocate against the city's planned redevelopment project were not similarly targeted for eviction from the marina, through legal process and other "self-help" eviction tactics, and were not subject to similar harassment by city police and city employees (dog-walking stops, and invasive photography of Plaintiff in his home).

The City argues that the Plaintiff fails to show sufficient similarity of comparators to state an equal protection selective enforcement claim, where the alleged conduct of other audience members is not similar to that of Plaintiff, where it is not alleged that they disrupted the council meetings times by speaking off-topic, at high volume, and over the members of the council, and further, that the alleged conduct of other marina lessees is not similar to Plaintiff, where it is not alleged that they were significantly delin-

quent in their dockage fees, or had dogs that were aggressive toward other dogs or people.

The City also points out the video of the January 3, 2007 meeting of the City Council shows that another audience member, Christi "Pepper" Newman, was also removed from the podium right after Lozman was removed. According to the City, Pepper, like Lozman, was similarly situated in the sense her speech was critical of the City (she complained that the City was remiss for not standing up to Lozman and suing him for slander), and she was also forcibly removed from the podium. As to the eviction efforts and ultimate seizure of Lozman's floating home, the City notes that Lozman has not identified any other marina residents with floating homes or vessels who were "similarly situated" in the sense that they were in violation of marina "wet slip" agreements by way of a failure to satisfy arrearage for dockage fees.

The court concludes that the selective enforcement claim fails because the summary judgment record does not contain sufficient evidence from which a reasonable person could infer that the Plaintiff and other council meeting audience members were similarly situated, or that Plaintiff and other marina residents and lessees were similarly situated. Because the record does not contain sufficient factual allegation from which disparate treatment can be inferred, the court shall grant the City's motion for summary judgment on Lozman's Fourteenth Amendment Equal Protection claim.

4. Fourteenth Amendment Due Process Claims

Lozman also alleges that the City violated his Substantive and Procedural Due Process rights under

the Fourteenth Amendment through the conduct of its campaign to harass, retaliate and punish Lozman for his public criticism of the City and certain City officials [Second Amended Complaint, paragraph 42]. However, a § 1983 claim cannot be sustained based on the filing of criminal charge without probable cause under the substantive due process or procedural due process protections of the Fourteenth Amendment. *Becker v. Kroll*, 494 F.3d 904 (10th Cir. 2007), citing *Albright v. Oliver*, 510 U.S. 266 (1994). The underpinning theory is that the more general due process considerations of the Fourteenth Amendment are not a fallback to protect interests more specifically addressed by the Fourth Amendment in the § 1983 context. *Id.*, citing *Albright* at 273 (quoting *Graham v. Connor*, 490 U.S. 386 (1989).

Under this same rationale, the Plaintiff's substantive due process claim fails to the extent based on a First Amendment violation, because "a cause of action cannot be based in substantive due process where a more specific constitutional provision is applicable," and a "substantive due process right to free speech is duplicative of [a] First Amendment retaliation claim." *Bradenburg v. Housing Authority of Irvine*, 253 F.3d 891, 900 (6th Cir. 2001). The court shall accordingly grant the City's motion for summary judgment on the § 1983 claim to the extent premised on alleged Fourteenth Amendment Substantive and Procedural Due Process violations.

5. Riviera Beach Community Redevelopment Agency

The City argues that the Riviera Beach Community Redevelopment Agency (CRA) is a legal entity

which is separate and distinct from the City of Rivera Beach, and that the City accordingly cannot be liable for any constitutional deprivations or tortious conduct attributed to members of the CRA. See §163.357(1), Fla. Stat. (2013). On this tenet, it moves for summary judgment on all claims to the extent premised on conduct of CRA members, as described in the Plaintiff's Second Amended Complaint at paragraphs 1, 15-18, 2(c),28(d), 28(g), 28(i), 48(b), and 66.

Upon consideration, the court has determined to defer its ruling on this ground of the City's motion for summary judgment.

B. State Law claims

1. Failure to comply with conditions precedent

On the supplemental state law claims, the City argues that all of Lozman's state claims should be dismissed with prejudice for Plaintiff's failure to comply with pre-suit notice requirements of § 768.28(6), Fla. Stat. (2013). The City contends that because no pre-suit notice was given, and because the three-year statute of limitation on these claims has expired, it would be futile to give Lozman an opportunity to provide the notice now and re-plead his complaint accordingly. Thus, the City moves for summary judgment on all state claims for failure to satisfy all conditions precedent to suit.

Lozman contends that his former attorney, Robert Bowling, sent a pre-suit notice on July 9, 2008 to City Attorney Pamela Ryan, as well as to the City's outside litigation counsel, Benjamin Bedard. He supports this contention with an affidavit identifying a

letter issued on "Cobb & Cole" firm letterhead, addressed to Pamela Ryan, City Attorney for Riviera Beach, which describes certain First, Fourth Amendment and Fourteenth Amendment claims against the City based on Lozman's arrest in November 2006, and an antagonistic course of conduct that followed. Lozman concedes that the Second Amended Complaint does not specifically allege the giving of pre-suit notice through this letter, and asks for permission to amend his complaint to do so.

The court shall grant Lozman's request to amend his complaint by interlineation to allege the giving of pre-suit notice as to the November 2006 false arrest and battery claims, which are fairly identified in Attorney Bowling's notice of claim. However, this notice cannot be read to cover claims which accrued after that point in time, such as the alleged battery arising from the October 2009 incident or the conversion claim arising from the City's arrest and seizure of Lozman's floating home in November 2009.

Further, as to the battery claim arising out of the October 2009 incident, Lozman failed to file the requisite notice within three years of the accrual of his claim, as required by § 768.28(6), Fla. Stat. (2013). Because this is not in the nature of a continuing tort, it would be futile to allow him an opportunity to provide the notice now as the statutory period of limitation has expired. Accordingly, the City is entitled to a dismissal with prejudice of the state law battery claim to the extent based on the October 2009 incident, and the court will enter summary judgment in its favor accordingly.

The court reaches a different result, however, on the Plaintiff's state law conversion claim. This claim did not accrue until the point in time that the City's possession of Lozman's floating home became wrongful, which occurred when the Supreme Court ruled that Lozman's floating home did not qualify as a "vessel" and, therefore the district court had lacked subject matter jurisdiction. Under Florida law, the City's lawful possession of the floating home during the course of the admiralty proceeding did not become wrongful simply because Lozman demanded the return of his property during the course of that proceeding. Rather, the conversion action could accrue only after the City lost the protection of the federal district court's authority over the matter in the course of the federal *in rem* admiralty proceedings. *Snell v. Short*, 544 F.2d 1289 (5th Cir. 1977) (conversion claim accrued after police lost protection of order of court or magistrate, not when officers refused plaintiff's demand for return of money).

Since the statute of limitations has not run on Lozman's state law conversion claim, but because he has failed to provide the City with the statutorily required pre-suit notice of claim, the court will dismiss Lozman's state law conversion claim without prejudice, and grant the City's motion for summary judgment on this claim to this limited extent.

C. Plaintiff's Motion for Partial Summary Judgment

Conversion is act of dominion wrongfully asserted over another's property inconsistent with his or her ownership interests. In this case, Lozman contends he is entitled to summary judgment on his common

law conversion claim because the evidence shows he owned the floating residential structure at the time the City arrested and seized it; the City intentionally arrested the floating home in a "sham" federal admiralty action after Lozman prevailed in a state eviction action; the City refused his repeated demands for return of his home (based on the federal court's lack of jurisdiction over the structure) during the course of admiralty proceedings; and the City wrongfully and vindictively destroyed the floating home after purchasing it as highest bidder at a U.S. Marshal sale in Miami, making it impossible to restore the property to Lozman even after the United States Supreme Court ruled in his favor on the invalidity of the jurisdictional threshold underpinning the in rem proceeding.

The common law tort of conversion may lie even if defendant took or retained property on mistaken belief he had a right to possession. *Seymour v. Adams,* 638 So.2d 1044 (Fla. 5th DCA 1994), i.e. a tort may lie even if the act is accomplished without specific wrongful mental intent. *City of Cars, Inc. v. Simms*, 526 So.2d 119 (Fla. 5th DCA), *rev. den.*, 534 So.2d 401 (Fla. 1988). Thus, the court concludes that the initial existence of probable cause to sustain the arrest and seizure of the floating home, as determined by the federal district court in the admiralty proceeding, does not necessarily defeat a claim for common law conversion.

However, the court has concluded this claim is not ripe for adjudication for failure to give pre-suit notice of claim, as required by § 768.28(6), as discussed above, and that the claim is appropriately dismissed from this action without prejudice for the

Plaintiff to reassert it after provision of proper notice and issuance of the City's denial of claim, or expiration of the statutory period within which the City is obligated to respond, whichever comes first. Accordingly, the court shall deny Lozman's motion for partial summary judgment on the state law conversion claim.

V. Conclusion

Based on the foregoing, it is **ORDERED AND ADJUDGED**:

1. The City's motion for summary judgment is **GRANTED IN PART and DENIED IN PART** as follows:

   a. The motion is **DENIED** as to the § 1983 claim based on First Amendment retaliation, and **DENIED** as to the § 1983 claim based on Fourth Amendment false arrest of the Plaintiff's person.

   b. The motion is **GRANTED** as to the § 1983 claim based on Fourth Amendment false arrest of the Plaintiff's floating home.

   c. The motion is **GRANTED** as to the § 1983 claims based on Fourteenth Amendment Substantive and Procedural Due Process violations.

   d. The motion is **GRANTED** as to the § 1983 claim based on Fourteenth Amendment Equal Protection violations.

   e. The motion is **GRANTED**, based on sovereign immunity, as to the state common law claim

of battery to the extent based on the October 2009 incident described in the complaint;

f. The motion is **DENIED** as to the state common law claim of battery and false arrest to the extent based on the November 2006 arrest described in the complaint.

g. The motion is **GRANTED** as to the state common law claim of conversion based on the City's arrest and seizure and destruction of Lozman's floating home, to the extent that court hereby **DISMISSES WITHOUT PREJUDICE** the conversion claim due to Plaintiff's failure to show compliance with the pre-suit notice of claim requirements of § 768.28(6).

2. The plaintiff's motion for partial summary judgment on the common law conversion claim is **DENIED.**

DONE AND SIGNED in Chambers at West Palm Beach, Florida this 19th day of August, 2014.

Daniel T.K. Hurley
Daniel T.K. Hurley
United States District Judge

cc. Fane Lozman, *pro se*
All counsel

APPENDIX C

[1]
[FINAL VERSION] 12-15-14, 5:00 p.m.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-CIV-80134-HURLEY

FANE LOZMAN,

Plaintiff,

vs.

CITY OF RIVIERA BEACH,

Defendant.

_____/

THE LAW

Members of the Jury:

I will now explain to you the rules of law that you must follow and apply in deciding this case. When I have finished you will go to the jury room and begin your discussions – what we call your deliberations.

* * *

[5]

FIRST AMENDMENT RETALIATION

On this claim, Mr. Lozman alleges that Riviera Beach officials and employees retaliated against him for engaging in constitutionally protected speech and conduct, *viz.*, for filing a "Government in the Sunshine Act" suit against Riviera Beach, and/or for

speaking against the City's proposed marina redevelopment project, and/or for speaking about public corruption in Riviera Beach.

To prove that he was retaliated against in violation of his First Amendment rights, Mr. Lozman must prove all of the following elements by a preponderance of the evidence:

(1) That he engaged in speech or petition conduct protected under the First Amendment;

(2) That a city official or employee intentionally took "retaliatory" action against him;

(3) That the city official or employee acted under color of law when he or she retaliated against or punished Mr. Lozman; and

(4) That there was a causal connection between the retaliatory action and the protected speech or conduct.

[6] As for the first element, I instruct you that Mr. Lozman's public criticism of the City's proposed marina redevelopment project and any views he expressed about perceived public corruption in the City of Riviera Beach were protected under the First Amendment, as was his conduct in filing a "Government in the Sunshine" suit against the City; therefore, the first element on this claim has been established.

On the second element, a "retaliatory" action is defined as one which would likely deter a person of ordinary firmness from exercising his or her First Amendment rights. To decide whether an action constituted "retaliatory" conduct in the context of this case, you must determine whether the complained-of

action would deter a person of ordinary firmness from exercising their protected speech and/or engaging in their protected conduct. A person of ordinary firmness means a similarly-situated reasonable person in Mr. Lozman's position. This is an objective standard but in determining whether it has been met, the jury may consider whether Mr. Lozman himself was deterred from exercising his First Amendment rights.

As for the third element, while the City denies that any official or employee acted with an impermissible animus toward Mr. Lozman, the City agrees that all of the cited officials and employees – with the exception of Mr. Gilmore (the golfcart driver) – were acting under "color of law," i.e., they acted as municipal employees.

To establish the fourth element – a causal connection between intentional retaliatory conduct and constitutionally protected speech and/or conduct – Mr. Lozman must show that the city employee or official involved was *subjectively motivated* to take the retaliatory action *because of* Mr. Lozman's protected speech or conduct *(viz.,* filing a "Government in the Sunshine Act" suit against the City, and/or publicly criticizing the City's proposed marina redevelopment [7] project and/or speaking about perceived public corruption in Riviera Beach). To make this connection, it is sufficient to show that the protected speech or conduct was *a substantial motivating factor* for one or more of the alleged retaliatory acts. That is, the impermissible animus does not have to be the only motivating factor, but it must be a "substantial" one. A substantial motivating factor means a significant factor, *i.e.* one that played a substantial part in triggering the alleged retaliatory action.

If you find by a preponderance of the evidence that Mr. Lozman's protected speech and/or conduct was a motivating factor behind any one or more of the alleged retaliatory acts, the burden then shifts to the City to show that it would have taken the same action in the absence of protected conduct, in which case the City cannot be held liable.

In considering Mr. Lozman's First Amendment retaliation claim, it can be subdivided into four parts. I will discuss each of them individually.

(A) ADVERSE ACTIONS AT CITY COUNCIL MEETINGS

In the first subcategory or segment, Mr. Lozman claims that city officials retaliated against him is by interrupting him while he was speaking during public comment periods at city council meetings and cutting him off or directing his removal from the podium. In your deliberations on this segment of the First Amendment retaliation claim, you must make a factual determination on the official's motive. Mr. Lozman claims that the official had an impermissible animus to punish him for having exercised his First Amendment rights by opposing the marina project, or by speaking about perceived public corruption in Riviera Beach, or by filing a Government in the Sunshine Act lawsuit. The City, however, denies that the Chairperson of the City Council or any other city official had such a retaliatory motive, and [8] contends that the chairperson was simply enforcing normal procedure and rules of decorum during the public comment portions of the city council meetings.

The constitutionality of the City's rules of procedure and decorum is not at issue in this lawsuit.

I instruct you that the law permits a municipal government to impose restrictions on speech during the public comment period at city council meetings. For example, a city may limit the amount of time speakers receive to make their public comments. Also, a city may restrict the topic of the public comments to matters relevant to an agenda item or to matters relevant to Riviera Beach or actions that the city council should undertake or refrain from undertaking. A city, however, cannot engage in viewpoint discrimination, i.e., it cannot prohibit or limit public comment based on the speaker's view of a permissible topic.

If you find that a city official in this case was motivated by a simple desire to enforce its rules of procedure and decorum, and that the official was not subjectively motivated by a desire to punish or retaliate against Mr. Lozman for engaging in protected speech and conduct, then you should find no "retaliation," and your verdict on this segment of Mr. Lozman's First Amendment retaliation claim should be in favor of the City.

On the other hand, if you find the city official's conduct was motivated by a desire to retaliate against Mr. Lozman because of his protected speech or conduct, and that this motive was a substantial factor behind the official's decision(s) to stop or remove Mr. Lozman from the podium at one or more city council meetings, then you should find the element of "retaliation" satisfied and proceed to determine whether there is a basis for holding the City liable for that conduct under one of the theories of municipal liability on which I will separately instruct you in a moment.

[9]

(B) OTHER ALLEGED RETALIATORY ACTS

A second way that Mr. Lozman claims to have been retaliated against is that city employees engaged in various retaliatory acts of harassment against him during the course of his daily life at the marina. For example, Mr. Lozman contends that (a) Riviera Beach police officers harassed him for walking his dog without a muzzle; (b) a marina employee tried to run him over in a golf cart; (c) city employees cut off his electricity; (d) city employees followed him and took his photograph; and (e) Pierre Smith, a city employee, took photographs of Mr. Lozman inside his floating home.

In order to prevail on this particular segment of the plaintiff's First Amendment retaliation claim, Mr. Lozman must prove all four elements listed on page 5 of these instructions. I will discuss those elements further as they apply to this segment.

As instructed earlier, Mr. Lozman's speech in opposition to the city marina project, his comments about perceived corruption in Riviera Beach, and his filing of the Government in the Sunshine suit constituted protected speech and conduct under the First Amendment.

Also, as instructed earlier, a governmental official or employee "retaliates" against a citizen if the official or employee's actions would likely deter a person of ordinary firmness from exercising his First Amendment rights. So in assessing the element of "retaliation," in connection with this harassment segment of Mr. Lozman's First Amendment retalia-

tion claim, you shall consider whether any one or more of the alleged intentional acts of harassment would have this chilling effect on a person of ordinary firmness, *i.e.*, on a similarly situated reasonable person standing in Mr. Lozman's shoes.

[10] Finally, on the causation element, Mr. Lozman must show that his protected speech or conduct was a substantial motivating factor for any of the alleged intentional acts of retaliation in order to prove that he was retaliated against "because of" constitutionally protected activity.

If Mr. Lozman does not prove each of the elements listed on page 5 of these instructions as to each alleged act or incident, then he has not proven a violation of his First Amendment rights under this segment of his claim, and you should find in favor of the City on this segment.

On the other hand, if Mr. Lozman does prove each of the elements listed on page 5, then you should consider the court's instruction on municipal liability – a matter on which I will separately instruct you in a moment.

(C) ADMIRALTY ARREST OF FLOATING HOME

A third way that Mr. Lozman claims to have been retaliated against is by a city employee's initiation of an admiralty action against Mr. Lozman's floating home. Mr. Lozman claims that a city employee initiated the action with an impermissible animus, *i.e.*, to retaliate against or to punish him for having engaged in constitutionally protected speech or conduct. The City contends that its employee initiated the admiralty action because of legitimate concerns, such as

Mr. Lozman's failure to sign and comply with the approved dockage agreement.

To prove that he was retaliated against in violation of his First Amendment rights, Mr. Lozman must prove all four elements listed on page 5 of these instructions. I will discuss those elements further as they apply to this segment.

[11] As instructed earlier, Mr. Lozman's speech in opposition to the city marina project, his comments about perceived corruption in Riviera Beach, and his filing of the Government in Sunshine suit constituted protected speech and conduct under the First Amendment.

Also, as instructed earlier, a governmental official or employee "retaliates" against a citizen if the official or employee's actions would likely deter a person of ordinary firmness from exercising his First Amendment rights. So in assessing the element of "retaliation," in connection with this admiralty action segment of Mr. Lozman's First Amendment retaliation claim, you shall consider whether the employee's initiation of an admiralty action would have this chilling effect on a person of ordinary firmness, *i.e.*, on a similarly situated reasonable person standing in Mr. Lozman's shoes.

Also, as instructed earlier, it has been stipulated or agreed that the city employee who initiated the admiralty action acted under "color of law" and therefore this element has been satisfied.

Finally, on the causation element, Mr. Lozman must show that his protected speech or conduct was a substantial motivating factor for the City employee's

initiation of an admiralty action in order to prove that he was intentionally retaliated against "because of" constitutionally protected activity.

If Mr. Lozman does not prove each of the elements listed on page 5 of these instructions, then he has not proven a violation of his First Amendment rights under this segment of his claim, and you should find in favor of the City on this segment.

[12] On the other hand, if Mr. Lozman does prove each of the elements listed on page 5, then you should consider the court's instruction on municipal liability – a matter on which I will separately instruct you in a moment.

(D) FALSE ARREST AS "RETALIATION" UNDER FIRST AMENDMENT

A fourth way that Mr. Lozman claims to have been retaliated against was his arrest on November 15, 2006. In order to prove that he was retaliated against in violation of his First Amendment rights, Mr. Lozman must prove all of the four elements listed on page 5 of these instructions. In addition, he must prove that the arresting officer lacked probable cause to believe that Mr. Lozman had or was committing a crime.

In other words, to prove that he was retaliated against in violation of his First Amendment rights, Mr. Lozman must show by a preponderance of the evidence:

First: That he engaged in speech or conduct protected by the First Amendment;

Second: That a Riviera Beach police officer arrested him and the officer was motivat-

ed to take this action because he had an impermissible animus to retaliate against Mr. Lozman for engaging in constitutionally protected speech or conduct;

Third: That the arresting officer acted "under color" of state law;

Fourth: That the arresting officer lacked probable cause to believe that Mr. Lozman had or was committing a crime.

On the first element, I have already instructed you, Mr. Lozman engaged in constitutionally protected speech and conduct when he criticized the City's proposed marina redevelopment plan, voiced concern about perceived public corruption in Riviera Beach, and filed his Government in the Sunshine Act suit against the City. Therefore, the first element has been established.

[13] On the second element, as I have previously instructed you, a governmental official or employee "retaliates" against a citizen if the official or employee's actions would likely deter a similarly situated, reasonable person in the plaintiff's position from exercising his First Amendment rights.

On the third element, the parties have stipulated or agreed that Officer Aguirre, the arresting officer involved in the November 15, 2006 arrest, acted "under color" of state law. Therefore, the third element has been established.

As for the fourth element, it is undisputed that Officer Aguirre arrested Mr. Lozman at the November 15, 2006 city council meeting when the officer

placed handcuffs on Mr. Lozman. The remaining question is whether Officer Aguirre had "probable cause" to conclude that Mr. Lozman had committed or was committing a crime. An officer has probable cause to arrest a person without a warrant whenever the facts and circumstances within the officer's knowledge, based on reasonably trustworthy information, would cause a reasonable officer to believe that a person has committed, is committing, or is about to commit a crime. The standard for this inquiry is an objective standard – what conclusion would have been reached by a reasonable police officer viewing all of the existing facts and circumstances.

Under Florida law, any person who "willfully interrupts or disturbs any . . . assembly of people met . . . for any lawful purpose" commits the crime of disturbing a lawful assembly. I instruct you that a city council meeting is a "lawful assembly" within the meaning of this statute.

For a police officer to have probable cause to arrest a person for the crime of disturbing a lawful assembly, the officer must have reasonable grounds to believe that:

[14]

(1) That an individual was acting with the intention that his behavior impede the successful functioning of the assembly, or with reckless disregard of the effect of his behavior;

(2) That he individual's acts were such that a reasonable person would expect them to be disruptive; and

(3) That the individual's acts did, in fact, significantly disrupt the assembly.

If Mr. Lozman does not prove each of the elements listed on page 5 of these instructions, plus a lack of probable cause for his arrest, then he has not proven a violation of his First Amendment rights under this segment of his claim, and you should find a favor of the City on this segment.

On the other hand, if Mr. Lozman does prove each of the elements listed on page 5 plus a lack of probable cause, then you should consider the court's instruction on municipal liability – a matter on which I will separately instruct you in a moment.

* * *